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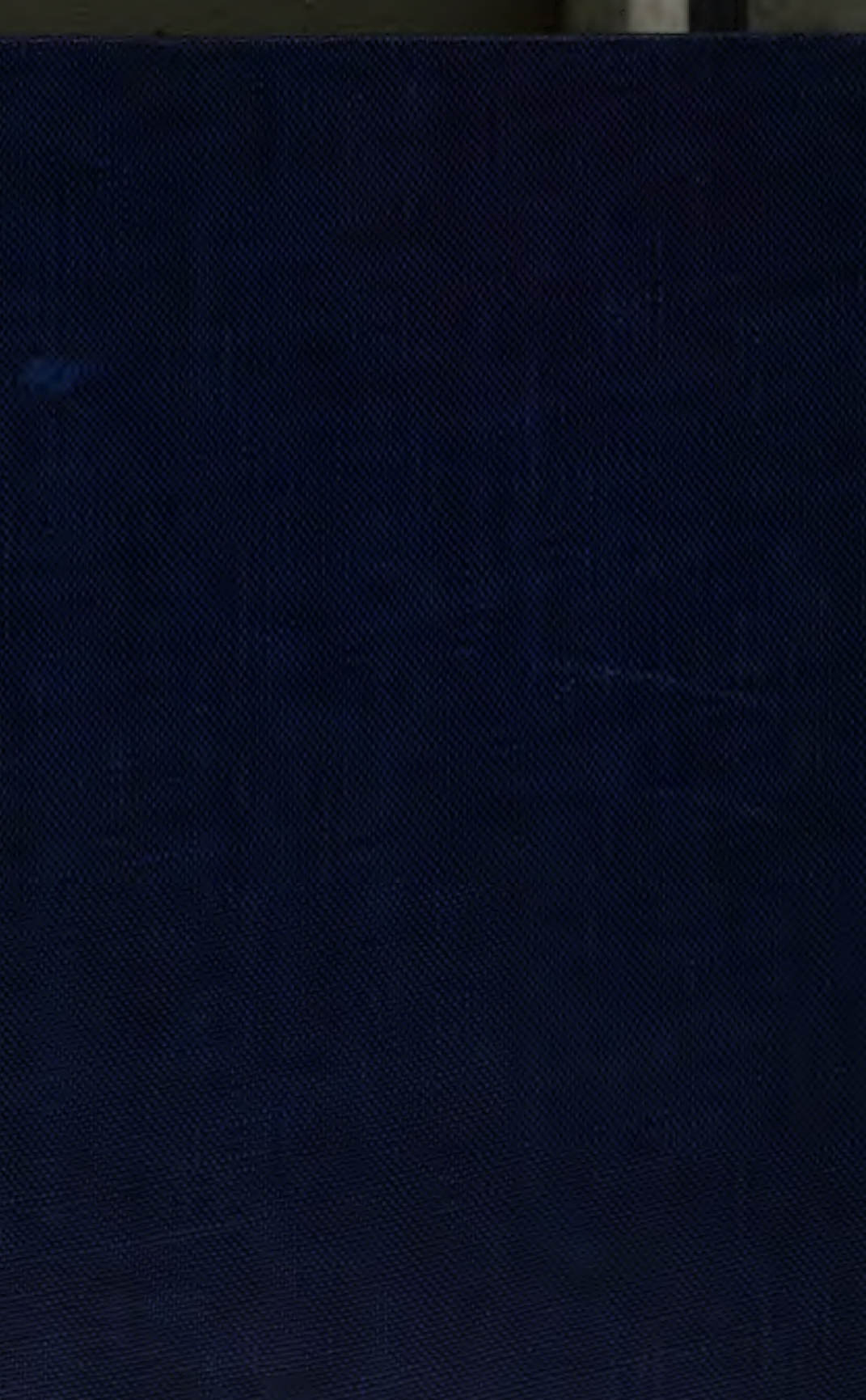
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THE
REVISED REPORTS

BEING
A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY
SIR FREDERICK POLLOCK, BART., LL.D.,
CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

ASSISTED BY
R. CAMPBELL, **AND** **O. A. SAUNDERS,**
OF LINCOLN'S INN, ESQ. OF THE INNER TEMPLE, ESQ.
BARRISTERS-AT-LAW.

VOL. XXXIV.

1829-1832.

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WALL & CRESSWELL-3 MANNING & RYLAND-8 BING-
HAM-1 MOORE & SCOTT-4 CARRINGTON & PAYNE-
DANSON & LLOYD-9 LAW JOURNAL (O.S.).

LONDON:
SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE.

BOSTON:
LITTLE, BROWN & CO.
1898.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

PREFACE TO VOLUME XXXIV.

It appears from the report of the argument in *Alexander v. Duke of Wellington*, at p. 12, that in 1831 there was still no settled practice as to who should begin on an appeal in the Court of Chancery.

Lord Brougham's remark on Vernon (p. 66), that "his general accuracy as a reporter is not always to be relied on," is fully borne out by other learned opinions: but it must be remembered, in justice to Mr. Vernon, that his reports were never revised by himself for publication, and perhaps not designed by him to be published at all. See Wallace on the Reporters, 4th ed., pp. 493—497.

At p. 60 will be found a short report preserved in 2 Russ. & My. of a case decided by Sir W. Grant as early as 1815. It is obvious that cases distributed through later reports in this way could not have been assigned to their proper places in the Revised Reports, unless by reading through the whole of the reports to be dealt with before commencing the republication of any; which would have amounted to postponing the appearance of the first volume of the Revised Reports for many years.

Monypenny v. Bristow, p. 30, is an important case on

the liability of a personal representative for his testator's wrongful acquisitions of personal estate. *Dickinson v. Valpy*, p. 348, though decided on facts which could hardly recur under the present system of company law and practice, lays down a rule as to the authority of directors which, depending as it does on principle and on principle only, is not only still sound, but is a necessary guide to the understanding of modern legislation on the subject. *M'Pherson v. Daniels*, p. 397, settled (contrary to some former appearance of authority) the point that one cannot justify the repetition of slander merely by vouching over a person from whom one heard it.

Planché v. Colburn, p. 613, is one of the cases most constantly referred to for the principles determining the right to sue on a *quantum meruit* when complete performance of the original contract has become impossible. *British Linen Co. v. Drummond*, p. 595, is interesting to students of the conflict of laws. It is perhaps the best illustration of the rule that Statutes of Limitation belong to the law of procedure, and therefore are applied to all proceedings in their own jurisdiction, even if the questions of substance in the case have to be decided according to a foreign law. *Wellesley's case*, p. 159, is a considerable authority on the somewhat delicate subject of the limits of parliamentary privilege. In *Daubney v. Cooper*, at p. 380, we find it judicially laid down as "one of the essential qualities of a court of justice that its proceedings should be public." This rule seems to be peculiarly English, or at

any rate Germanic, and is one of the rules so fundamental in our system of justice that they seldom have to be enunciated.

Conservators of the River Tone v. Ash, p. 441, "is the leading case in which a corporation has been held to have been created by implication," because effect could not be given to the statute unless the public body thereby constituted was a body corporate: per Lindley, L. J. in *Mayor of Salford v. C. C. of Lancashire* (1890) 25 Q. B. Div., at p. 389.

Miller v. Travers, p. 703, is one of those decisions on principles of interpretation which are not leading cases themselves only because their substance has been taken up into later cases of more celebrity.

F. P.

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JOURNAL (O. S.).

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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

The Revised Reports.

VOL. XXXIV.

CHANCERY.

ALEXANDER v. THE DUKE OF WELLINGTON.†

(2 Russ. & Mylne, 35—65; S. C. 9 L. J. Ch. 36.)

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the Crown.

A warrant of the Crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be cestuis que trusts compel a distribution under it by a suit in equity against the trustees.‡

Seemle, The Crown may at any time before distribution, alter or revoke a grant of military prize.

IN the year 1817, the late Marquis of Hastings, who was then Governor-General of India, and who also held the appointment of commander-in-chief of all the forces in the East Indies, as

† This case, commonly known as the *Deccan* case, is the leading case on the subject of military booty, and is considered and discussed at length in the *Banda and Kirwee Booty* case (1866) L. R. 1 A. & E. see pp. 148 to 154, where, as here, the principle of "actual capture" as distinguished

from "joint capture" was held to be the governing rule. Subsequent proceedings in this matter before the Privy Council are reported in 2 Knapp, P. C. 103.—O. A. S.

‡ *Kinloch v. Secretary of State for India* (1882) 7 App. Cas. 619; 51 L. J. Ch. 885.

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Nov. 15, 16.

Rolls Court.
LEACH, M.R.
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1831.
May 26, 27.

Lord
BROUGHAM,
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well those of his Majesty, as those of the East India Company, commenced hostilities against the Pindarrees, and against several of the Mahratta princes, who were threatening an attack on the British territories. With a view to the vigorous prosecution of the campaign, and in order more effectually to co-operate with the rest of the troops engaged in the same service, his Lordship took the field in person at the head of a large force belonging to the Presidency of Bengal, and known by the name of the Grand Army; but the chief burthen of active war fell upon the forces which were posted in the near vicinity of the hostile states. The forces assembled in that quarter consisted, partly of what formed properly the Deccan division, commanded by Lieutenant-General Sir Thomas *Hislop, and partly of brigades and detachments from other divisions and belonging to different Presidencies. The whole bore the general appellation of the army of the Deccan, and acted under the orders of Sir T. Hislop in virtue of an appointment as its commander-in-chief. In the following year hostilities terminated in the total defeat and subjugation of the native powers, and a very large quantity of valuable booty, consisting chiefly of stores and treasure, fell into the hands of the conquerors as the fruits of their success. Portions of this booty were acquired by the enterprise of small detachments, who acting independently of the main army, attacked and plundered individual forts, in some instances after the camp had been broken up and open warfare had ceased. Another and much larger portion was captured by the troops composing the Deccan army, by whom the active operations of the war were principally carried on: but the whole of it, from whatever sources derived, and by whatever parties won, was ultimately thrown, under the general denomination of the Deccan prize, into one common fund, which, being prize taken in war, was admitted to have vested in the Crown by force of the prerogative, and to be disposable therefore according to the pleasure of his Majesty.

On the 10th of October, 1820, and the 1st of December, 1822, long before any distribution of the booty had taken place, and before even the principles on which a distribution should be regulated had been declared, the Marquis of Hastings, who still continued to fill the offices of Governor-General and Commander-

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in-chief of the forces in India, executed and gave to Messrs. Alexander & Co., bankers in Calcutta, two several indentures, whereby in consideration of certain advances made to him, and to secure the repayment thereof, he assigned to Alexander & Co. all his expectant share *and interest in the Deccan prize money whatever it might be.

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In the mean time it became understood that, in the exercise of the royal bounty, the Deccan prize would be distributed, as had been usual in similar cases, among the officers and men who had been concerned in its acquisition ; and his Majesty having referred it to the Lords Commissioners of the Treasury to consider and report upon the mode in which a distribution might be most equitably made, memorials were presented to their Lordships on behalf of the East India Company, Lord Hastings, Sir T. Hislop, and others, bringing forward the respective claims of the memorialists upon particular portions of the fund.

The result of their Lordships' deliberations was communicated to his Majesty in the form of a Treasury minute, which bore date the 5th of February, 1823, and of which the following is the material part :

“ My Lords, having heard counsel in support of the claims of the Marquis of Hastings and the grand army, and of those of Sir Thomas Hislop and the army of the Deccan, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel, are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case will admit, to that of actual capture, and although they are aware that the principle of constructive capture must, under certain circumstances in a degree be admitted, the disposition should be to limit rather than to extend that principle. They are therefore of opinion that the mode of distribution originally intended by the Marquis of Hastings *would be most equitable and just with respect to the booty taken at Poonah, Mahidpore, and Nagpore, and that the booty taken on each of these occasions respectively should belong to the divisions of the Deccan army engaged in the respective operations in which the same was captured : but that

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as the division of the Bengal army under Brigadier-General Hardyman appears to have been put in motion for the purpose of co-operation directly in the reduction of Nagpore, and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my Lords to be justly entitled to share in the booty captured at Nagpore and that such other booty arising from the operations against the Mahrattas in the years 1817 and 1818 as may now be subject to his Majesty's royal disposition, should be granted to such divisions of the grand army under the command of the Marquis of Hastings, and of the Deccan army under the command of Sir Thomas Hislop, as may respectively have captured the same. My Lords are also of opinion, that conformably to the letter of the Marquis of Hastings to Sir Thomas Hislop of the 12th of January, 1818, Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818. My Lords have felt it to be inconsistent with their duty, to recommend to his Majesty to give his sanction to any agreement for the common division of booty into which the several divisions of either army may have entered, as it is their decided opinion, that if the principle of actual capture be not adopted in this case, as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution among the forces of all the *Presidencies engaged in the combined operations of the campaign. My Lords do not consider that, under all the circumstances of the case, it will be expedient to recommend to his Majesty to grant any part of the booty to the East India Company; and my Lords will submit to his Majesty their recommendation, that he will be graciously pleased to direct that his royal grant of the said booty may be made in conformity with these principles; and for the purpose of better carrying into effect his Majesty's gracious intention in this behalf, my Lords will recommend to his Majesty, that a grant be made of the said booty to trustees, to be appointed by his Majesty, for the purpose of ascertaining and collecting the

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said booty, and for preparing a scheme for the distribution thereof, conformably to the principles above stated, which my Lords will submit for his Majesty's final approbation and sanction under his royal sign manual warrant."

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This minute was on the 22nd of March, 1823, followed by a royal warrant under the sign manual, which, after reciting the circumstances under which the booty had been acquired and had become vested in the Crown, set forth the Treasury minute at large, and continued in these terms: "And whereas we have been graciously pleased to approve of the said minute and recommendation of our said Commissioners: and whereas it is expedient that a warrant under our royal sign manual should be issued for granting the said booty to trustees to be appointed by us, for the purpose of ascertaining, collecting, and receiving the same, and for preparing a scheme of the distribution thereof, conformably to the principles recommended in the said minute: we, taking the premises into our royal consideration, are graciously pleased to give and grant, and do by these *presents give and grant," &c. The warrant then proceeded to grant to the Duke of Wellington and Mr. Arbuthnot all the property of which the booty was composed, "in trust for the purpose of collecting, recovering, and receiving all the said booty, or the proceeds or value thereof hereby granted, from the said United Company, their officers or servants, and all and every other person or persons whomsoever, unto or in whose hands, custody, or power the same, or any part thereof, may have come or may now be and remain;" and after investing the trustees with all the powers necessary for the due execution of their office, it continued in these words: "And when and so soon as the case will admit, we do authorize and direct our said trustees to prepare a scheme for the distribution of the said booty, and of all and every part or parts thereof, conformably to the principles recommended in the said minute of the Commissioners of our Treasury, and approved by us, which scheme shall be submitted by them to the said Commissioners of our Treasury for the signification of our royal pleasure thereon."

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When the trustees came afterwards to frame their scheme upon the basis of this warrant, difficulties were experienced in practically applying the principles laid down for their guidance

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to the actual state of circumstances before them, and considerable delay took place in consequence. Eventually they addressed a letter to the Lords of the Treasury, stating to their Lordships the various respects in which those principles were, in their opinion, incorrect and inapplicable; and a second minute, founded, in a great measure, on the views taken in the letter of the trustees, was shortly after drawn up and issued from the Treasury. It bore date the 16th of January, 1826, and was in these terms:

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“ My Lords, assisted by the trustees of the Deccan booty, by Lord Bexley, and the law officers of the Crown, having heard counsel on behalf of the Marquis of Hastings and the grand army, and also on behalf of Sir Thomas Hislop and the army of the Deccan, upon the subjects of discussion relating to the distribution of the Deccan booty, which have arisen out of the difference between the actual circumstances attending the capture of a large proportion of that booty, as stated by the trustees, and those which were assumed at the hearing before their Lordships in January, 1823, and having maturely considered the arguments severally stated by the counsel, and also the whole of the documents upon the subject of this booty now before the board, are of opinion,—

“ First, That with respect to all that portion of the booty now at the disposal of the Crown which is described as having been ‘ taken in the daily operations of the troops,’ the distribution thereof should be made to the actual captors, according to the terms and conditions of the minute of this board of the 5th of February, 1823, and of the warrant of his Majesty of the 22nd of March following.

“ Secondly, That with respect to that part of the booty which consists of the produce of arrears of tribute, rent, or money due to the Peishwah, it appears to my Lords to have been acquired by the general result of the war, and not by the operations of any particular army or division, and they are of opinion that it ought, therefore, to be distributed in conformity with the alternative stated in their minute of the 5th of February, 1823, as being ‘ the only correct or equitable rule, if the principle of actual capture cannot be adopted,’ viz., amongst the forces of all the Presidencies engaged in the combined operations of the campaign.

“Thirdly, with respect to the property captured at Nassuck, my Lords are of opinion that the booty recovered at that place cannot be distributed upon the principle of actual capture, and ought, therefore, to be divided amongst the forces of all the presidencies engaged in the combined operations of the campaign.

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“Fourthly, with respect to the booty recovered at Poonah, alleged to have been removed thither from the Rai Ghur, my Lords are of opinion that this booty cannot be distributed upon the principle of actual capture to the force by which Rai Ghur was taken under the orders of the government of Bombay, unless it can be proved by the captors of Rai Ghur that the property in question was actually in that fort at the time when it was taken, in default of which proof my Lords are of opinion that this booty also ought to be distributed among the forces of all the presidencies engaged in the combined operations of the campaign.

“Fifthly, with respect to that portion of the booty which is stated to consist of money recovered on account of deposits made by the Peishwah, my Lords are of opinion that any part of this property which can be proved to have been in Poonah at the time when that place was captured, viz., on the 17th of November, 1817, ought to be distributed to the captors of Poonah according to the terms of the minute of the 5th of February, 1823, upon the principle of actual capture; but that with respect to those parts of the above property as to which such proof cannot be established, such monies or effects must be considered as having been acquired by the general result of the war, and as such ought to be distributed amongst the forces of all the Presidencies engaged in the combined operations of the campaign.

“Sixthly, with respect to the share of the commander-in-chief in the distribution under the several heads above enumerated, my Lords are of opinion that the Marquis of Hastings ought to share as commander-in-chief in all those cases in which Sir Thomas Hislop is not entitled to share as such under the terms of the minute of the 5th of February, 1823, wherein it is declared, ‘That Sir Thomas Hislop, as commander-in-chief of the Deccan army, and all the officers of the general staff of that army, were entitled to participate in the booty which may arise

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from any capture by any of the divisions of the army of the Deccan, until the said army of the Deccan was broken up on the 31st of March, 1818.'

"My Lords are further of opinion that the general rules of division hitherto adopted in the distribution of booty to the forces in India, among the several classes and ranks of the army, should be adhered to on the present occasion."

The minute of the 16th of January, 1826, was followed by a warrant under the sign manual, bearing date the 30th of September, 1826. This instrument stated, in its preamble, the warrant of March, 1823, and the consequential grant to the trustees, reciting that such grant was made "in trust, for the purpose of being distributed to the said forces according to a scheme directed by our said warrant, and submitted by the said trustees to the Commissioners of our Treasury, for the signification of our royal pleasure thereon." It then proceeded: "And whereas the said Commissioners of our Treasury have humbly submitted to us, for our gracious approval, a minute of their board, bearing date the 16th day of January, 1826, containing directions to the said trustees as to the principles on which they were to prepare the *scheme for the distribution of the said booty, of which further directions we have been graciously pleased to approve: and whereas the Commissioners of our Treasury have represented to us that they have maturely considered the schemes prepared in conformity to the said minute submitted to them by the said trustees for the distribution of certain parts of the said booty taken in the daily operations of the troops under the command of Lieutenant-General Sir T. Hislop at the following places; viz.,” &c. Here the warrant specified the several places where the booty taken was to be considered as falling within that description, and stated the value of the whole at 21 lacs 58,168 rupees, as more particularly set forth in the annexed schemes to which it referred. It then proceeded: "And whereas we are graciously pleased to approve of the said schemes, we do hereby authorise and direct our said trustees to distribute the proceeds of the said 21 lacs 58,168 rupees accordingly."

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The warrant for the distribution of those portions of the booty

which were to be considered “as having been taken in the daily operations of the troops,” and therefore distributable upon the principle of actual capture, was followed, on the 18th of February, 1828, by another warrant relating exclusively to that part of the booty to which the principle of constructive capture was to be applied. This latter warrant referred to, and formally approved of, the Treasury minute of January, 1826, in language precisely the same with that employed in the warrant of September, 1826, already set forth; and it continued in these words: “And whereas the Commissioners of our Treasury have represented to us that they have maturely considered the scheme prepared in conformity to the said minute, and submitted to them by the said trustees for distribution of a part of *the said booty acquired by the general result of the war by the forces under the command of the late Most Noble the Marquis of Hastings, commander-in-chief of all our forces in India, amounting in all to 41 lacs 39,803 rupees, &c., as shewn by the said scheme hereunto annexed, &c.; and whereas we are graciously pleased to approve of the said scheme, we do authorise and direct the said trustees to distribute the proceeds of the said 41 lacs 39,803 rupees accordingly.”

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The ostensible object of these two instruments was to give the royal sanction and approval to the schemes therein referred to, which were framed in conformity with the principles recommended in the Treasury minute of January, 1826. Their practical operation, when taken in connection with those schemes, was to authorise a distribution of the booty, proceeding to a much greater extent upon the principle of constructive capture than seemed to have been contemplated by the warrant of March, 1823. The result was extremely prejudicial to the interests of Sir T. Hislop and the Deccan army, who, under the language of the original warrant, considering themselves the actual captors of the great bulk of the property, had expected to share it exclusively among themselves; and it was proportionably favorable to Lord Hastings and the Grand Army, who were thus let in to participate in a fund which the Deccan army had supposed to be peculiarly its own, and of which the share allotted to

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Sir T. Hislop became in consequence reduced from that of commander-in-chief to that of a subordinate officer only.

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The Marquis of Hastings died in November, 1826, before any distribution of the prize had taken place; and the bill was filed by Messrs. Alexander & Co. for the purpose of establishing their title under the indentures *of October, 1820, and December, 1822, to the share accruing to the Marquis's estate by virtue of the warrant of February, 1828.

The scheme issued in pursuance of that warrant appeared in the *London Gazette* of the 11th of March, 1828, and was entitled "Grant to the combined army which served under the command of the late Most Noble Francis Marquis of Hastings, K.G., commander-in-chief of all the forces in India, engaged in the war against the Pindarrees and certain of the Mahratta States, in the years 1817 and 1818." This scheme had ascertained the value of the share allotted to the commander-in-chief of what was there denominated "the combined army" at the sum of 44,201*l.*, being one-eighth of the whole fund thereby apportioned among the officers and men who composed that army; and as the description of commander-in-chief was understood to apply to Lord Hastings, although his name was not mentioned in the body of the scheme, the sum so allotted was paid into Court in the cause of *Watson v. Duke of Wellington*,† by the trustees of the Deccan booty, and on the dismissal of that suit, was directed to be retained to abide the result of the present claim.

Sir T. Hislop, who denied the validity of Lord Hastings's title, and various incumbrancers who set up claims against the fund under instruments posterior in date to the assignments to Alexander & Co., were joined with the Marquis's personal representative as defendants to the bill.

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Of the questions argued at the hearing, the most material were the two following: first, whether the *share of the Marquis of Hastings would pass by the assignment executed by him, after the booty had been taken, but before the Crown had made any grant of it, or issued any warrant under the sign manual determining in what mode it should be distributed: secondly, whether the amount of the share of the Marquis of Hastings was to be

† 33 R. R. 293 (1 Russ. & M. 602).

considered as definitely fixed by the warrant of 1828, or whether it was still open to any party to claim to have it reduced, according to the principle of distribution alleged to be established by the warrant of 1823.

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Mr. Pemberton, Mr. Kindersley and Mr. Fane for the plaintiffs :

Captors have from the time of capture an inchoate right in effects captured as prize, which, though the title is not perfected till a grant is made by the Crown, is a vested right and is capable of transmission by assignment or otherwise: *Stevens v. Bagwell*.† * * *

The amount of the Marquis of Hastings's share is definitively fixed by the warrant and scheme of 1828, and no Court can now enter into the consideration of the question, whether a greater or less sum ought to have been allotted to him. * * * [48]

Sir Charles Wetherell and Mr. Stuart, for Sir Thomas Hislop, contended, at great length, that the fund was bound by the warrant of 1823, which established the principle by which the distribution of the booty was to be made, and that the distribution directed by the warrant of 1828 was not in conformity to this principle. [49]

Mr. Bickersteth and Mr. Griffith Richards, for the personal representative of the Marquis of Hastings :

The Marquis of Hastings had not, at the time when the security to Alexander & Co. was executed, such an interest in the booty, as was capable of assignment. * * *

Mr. Wray for the Crown. [50]

Mr. Spence, Mr. J. Russell, and Mr. Wright for other parties.

Mr. Pemberton, in reply :

* * If the distribution directed by the warrant of 1828 were at variance with the warrant of 1823, and the principle established by it, we might still argue, with much confidence, that the [51]

† 10 B. R. at p. 53 (15 Ves. 152).

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Crown was at liberty, at any time before a scheme of distribution was finally settled, to alter the mode of distribution as to his Majesty might seem fit. In truth, however, the warrant of 1823 has not the effect which is attributed to it by Sir Thomas Hislop. It is merely a grant of the booty to trustees, upon trust to collect the property; with a direction that they shall prepare a scheme of distribution, conformable to a certain principle laid down in a Treasury minute, and submit that scheme to his Majesty for approbation. * * *

The MASTER OF THE ROLLS held, that prize money was not in the nature of military pay, and was assignable in equity.

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He also held that the rights to the property comprised in the distribution made by the warrant of 1828, could be determined by that warrant alone, and that no claim to any part of that property could be sustained by Sir Thomas Hislop under the warrant of 1823.

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Sir Thomas Hislop appealed from the whole decree.

The LORD CHANCELLOR having called on the appellant's counsel to begin,

Sir C. Wetherell, Mr. Knight, and Mr. Stuart contended that the warrant of March, 1823, * * * was in effect, a trust deed, vesting in Sir T. Hislop and the forces under his command, a definite and absolute interest in the fund; such an interest as entitled them to call upon the trustees to proceed in the execution of their trust, and to bring them judicially to account, if they afterwards attempted to remould *or evade it. It was no defence to the trustees to say, that the Crown had issued two other warrants, of later date, in terms which virtually rescinded or revoked the first; for the property had been completely and irrevocably divested out of the Crown by the original grant, and could not be resumed at pleasure by any subsequent act of his Majesty, and the warrants of 1826 and 1828, therefore, were altogether nullities. * * *

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THE LORD CHANCELLOR:

From the magnitude of the stake involved in it, this appeal

is entitled to be termed very important; and it is also extremely important in another view, from the deep interest which many most meritorious individuals must necessarily take in the result. But here its whole interest ends; for if, on the one hand, I never saw a more important case, so, on the other, I have never, in the course of my experience at the Bar, seen one less encumbered with any kind of difficulty.

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I shall begin with stating principles touching the uncontested rights of the Crown in matter of prize; principles which have a material influence over the whole question, but which, however, they may have been admitted in point of form, have been altogether lost sight of in their application to the argument. That prize is clearly and distinctly the property of the Crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the state, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the Crown possesses this property *pleno jure*, absolutely and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize, must needs in all cases be the act of the Crown, by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the Crown was minded to depart with the property finally and irrevocably—whether, even in that case, the same paramount and transcendant power of the Crown might not enure to the effect of preserving to his Majesty the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this at all events is clear; that when the Crown by an act of grace and bounty, departs, for certain purposes and subject to *certain

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modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the Crown, as it was before the act was done.

This latter proposition is capable of illustration from a variety of sources, which were but slightly adverted to in the argument; for whether we refer to the decisions of venerable Judges, to the precedents furnished by prize proclamations, or to the more venerable authority of the letter of the statutes, from all of these it will be found that, in stating the absolute nature of the principle, I have not strained, but have rather fallen short of the truth.

The doctrine has been frequently recognized in cases where the question has arisen subsequently to the capture, and before condemnation; but the same principle was afterwards extended in the case of the *Elsebe Maas*† at the Cockpit, in which, after final adjudication in the Court below, but pending an appeal, and before the final decision of the appeal, the Crown thought proper, for reasons of state and public policy, to restore the prize at the expense of the captors. In other words, it was there determined, and that too upon a solemn and most able argument, and by a Judge the most learned and eminent of his time, the present Lord STOWELL, that when the Crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further costs of proceeding in the admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether *without a remedy. “It is admitted,” says Lord STOWELL, in language which it would be vain to praise or attempt to imitate, “it is admitted on the part of the captors whose interests have been argued with great force, (and not the less effective, surely, for the extreme decorum with which that force has been tempered) that their claim rests wholly on the order of Council, the proclamation, and the Prize Act. It is not, as it cannot be denied that, independent of these instruments, the whole subject-matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a creature of the Crown.

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† 5 Rob. 173.

No man has, or can have any interest, but what he takes as the mere gift of the Crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown. The acquisitions of war belong to the Crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution: it is universally received as a necessary principle of public jurisprudence by all writers on the subject, '*Bello parata cedunt reipublicæ.*'"† Upon that principle, accordingly, and holding that right not to be devested by the proclamation, and order in Council, and the Prize Act, Lord STOWELL decided, that up to the period of final adjudication the Crown can restore the prize, without thinking of consulting or taking the consent of the captor, who at his peril, and at the expense of his own blood and treasure, won that prize from the enemy.

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It has been strongly argued that the difference between prize proclamations and the warrant in question is this, that the prize proclamations only intimate the intention to *distribute or to grant, whereas here there is much more,—a grant actually executed. The prize proclamation, which was the subject of discussion in the case of the *Elsebe Maas*, now lies before me, and it will presently be seen whether or not that can, with any strictness of speech, be described as an intention indicated, and not a grant made. It is a solemn instrument—a proclamation by the King; and it runs in these terms;—"We, being desirous to make it known to our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice and consent of our Privy Council,"—not that we intend to do this or that, but—"that our will and pleasure is, that the net proceeds of all prize taken, the right whereof is inherent in us and our Crown, be granted to the takers, subject to the payment of costs and not otherwise, and the same prize may be so granted in the proportions and manner hereafter set forth, that is to say;"—and then comes the scheme of distribution, according to

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† 5 Rob. 181.

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which the Crown's will and pleasure is, that the prize shall vest and be distributed.

Throughout the whole of the instrument I find not a letter or a syllable that looks like the reservation of a power to alter or revoke. Here is a gift by the Crown, of a right inherent in the Crown, to be distributed among the captors according to a scheme laid down "herein," and not elsewhere, to be distributed as "hereafter set forth" and not otherwise, and without a tittle that points to the reserving of a power to revoke, or alter, or modify that scheme. Now I have said that the higher authority of the Act, if higher it be, shall affix the construction to this instrument, and shall shew what is the power of the Crown, even after it has issued the prize proclamation, after it has finally approved the scheme of distribution, and finally stated in what way the distribution was to be effected. It might have been argued *from that proclamation, much more strongly than from the warrant under consideration, that the grant was irrevocably tested, and that the gift must be held as upon a conveyance in trust, subject to the direction of the Court and the pleasure of the cestuis que trusts. That proclamation looks forward to no other act upon which final distribution is to attach. It does not say in the language of the present warrant, "to be distributed in such way, or according to such scheme as our Lords Commissioners shall lay before us, and as we shall approve of." Observe, nevertheless, how the Legislature has treated this very instrument in the Prize Act; and surely, if any statute be germane to the matter in hand, it must be the one passed by the authority of the Legislature at the beginning of each war, to regulate the rights of parties. No Prize Act ever presumes to interfere with the rights of the Crown. No Prize Act ever assumes that the Legislature is dealing with the rights of the Crown, but suggesting and prefixing a statement, that the Crown had given the net proceeds to be dealt with, in terms like the following: "Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prize taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty's service, or duly commissioned," it then

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proceeds to declare, adopting and confirming the proclamation, "that the captures be decided and distributed in such manner as his Majesty hath been pleased to order by the said proclamation of the 7th of July, 1803." But it does not stop there, as, had the grant been irrevocable and unchangeable, it would have done;—"or, in such manner as his Majesty, his heirs and successors may order and direct by any proclamation now or hereafter to be issued." Can any person who reads that statute doubt, that notwithstanding the words of gift *used by the Crown, notwithstanding the absolute and irrevocable nature of those words in the prize proclamation, the Legislature did look forward to a future period, when the Crown might thereafter recall and change the mode of distribution altogether?

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Here then is a legislative declaration, (for the statute is declaratory merely, and enacts no new law upon the subject,) that although the prize proclamation appears to make a distribution according to a scheme, without looking forward to any further approbation or alteration, the Crown has still the power to alter that scheme and substitute another, to vary and revoke it, to make a new distribution upon principles totally different.

Thus much with respect to prize at sea. In general, no Act passes with respect to military prize; nevertheless, that rests upon the same principles of law. The 54 Geo. III. c. 86, proceeds accordingly in these terms: "Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prizes taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty's service, or duly commissioned," &c.; and the second section provides, that all captures shall be divided in such proportions, and according to such general rule of distribution for the army as shall be established by his Majesty, or in default thereof, in such manner as his Majesty shall under his sign manual be pleased to direct; notwithstanding the preamble had recited that his Majesty had issued his proclamation, stating the mode of distribution that was to be adopted.

I come now to the warrant which lies before me for construction in the present case. It is admitted upon *all hands,

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whether the Lords of the Treasury were right or wrong in the conclusion they first came to, whether the second conclusion they came to is right or wrong, and whether the first was the same with the second, or the second altered or repealed the first, and substituted a new one, that these are no questions here. The only question raised now, and the only question which a court of law can entertain, is this, whether any thing was done by the Crown in the first warrant, which though a less formal instrument than the proclamation of prize I have referred to, is in substance a proclamation,—whether this warrant, under the royal sign manual, affords any foundation for the contention so ably and explicitly maintained, that the Crown departed with the property and vested a right in trustees for the benefit of parties in the nature of *cestuis que trusts*, a right which, though springing from a voluntary act of grace and bounty in the giver, became irrevocably vested in the trustees for those parties, and rendered the subsequent orders immaterial, inasmuch as they were superfluous and contradictory to each other.

First, I greatly doubt the propriety of calling this a trust deed, in any sense of the word. It is more like a power of attorney, given without an interest, and therefore revocable; or rather, perhaps, it resembles some of those arrangements, which are said to be of a family nature, for the payment of debts, and in which the principal object is not so much the creditor as the debtor, the maker of the instrument; and in this point of view the case becomes more nearly analogous to *Wallwyn v. Coutts*,[†] and *Garrard v. Lauderdale*,[‡] than to the cases of *Ellison v. Ellison*,[§] *Colman v. *Sarrel*,^{||} and *Pulvertoft v. Pulvertoft*;[¶] there being rather an agency created for the convenience of the grantor of the deed, than any interest conveyed to trustees for the benefit of those who may become beneficially entitled under it. But without pursuing this inquiry, let us look at the nature of the instrument itself. After reciting the minute of the Treasury, and that “it is expedient that a warrant should be issued, to grant the said booty to trustees, to be named by us for the

[†] 17 R. R. 173 (3 Mer. 707).

[‡] 30 R. R. 105 (3 Sim. 1).

[§] 6 R. R. 19 (6 Ves. 656).

^{||} 1 R. R. 83 (1 Ves. J. 50).

[¶] 11 R. R. 151 (18 Ves. 84).

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purpose of ascertaining, collecting, and receiving the same,"—not for distributing to A. B. and C., the persons beneficially interested—no, but "for the purpose of preparing a scheme for the distribution thereof, conformably to the principles recommended in the said minute; We, taking the premises into our royal consideration, are graciously pleased to give and grant the same to our trustees, for the purpose of collecting, recovering, and receiving the booty." The warrant then proceeds: "and also all monies into which the plunder or booty or any part thereof may have been converted, as well all such as may already have been secured or received into the hands of the United Company, or any of their officers or servants, or any other persons; as also all such as the trustees may hereafter recover or receive from the United Company, or any of their officers or servants, or any other person whomsoever;" and there it ends. The preamble says, "Whereas it is expedient to appoint trustees for the double purpose of collecting in the money, and for preparing a scheme for the distribution thereof;" the operative part says, "you the trustees are hereby vested with the booty, for the purpose of collecting and getting it in," without stating any other purpose. That is totally unlike vesting an interest in them for the purpose of distribution. What follows? Simply "a direction or power. The words are, "We do hereby empower the said trustees, under the authority, and by the direction of the Commissioners of our Treasury, to sue for and recover all such booty, and we authorize and empower our said trustees to allow all proper costs and charges, and we do authorize and direct our trustees to prepare a scheme for the distribution of the booty, and of all and every part and parts thereof, conformably to the principle recommended by the minute of the Commissioners of the Treasury, and approved by us, which scheme shall be submitted by them to the Commissioners of our Treasury"—to be acted upon by them without more ado? no such thing—"which scheme shall be submitted by them to the said Commissioners of our Treasury, for the signification of our royal pleasure thereon."

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Suppose a man were to say, I make you trustees for distributing 1,000*l.* among A., B., and C.; it might be contended

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that A., B., and C. were cestuis que trusts, and that the trustees were answerable to them. But suppose he says, I make you trustees touching certain of my debts, and after you shall have called them in, you are to lay before me a scheme, which when I have approved of, you shall then distribute the funds to A., B., and C., or somebody else. Can any one doubt that this would defeat the claim of A., B., and C.? Till I have seen the scheme, and exercised my discretion upon it, and issued what new directions I please, it cannot be said to vest a beneficial interest in the cestuis que trusts. All that this deed effects is, to appoint these persons "our trustees," (not trustees for the parties,) to collect the fund; and it desires them, in a manner merely directory, to lay a scheme for the distribution before the Crown. Now, no such step was taken till the years 1825 and 1826, when a scheme was laid before the Crown, and his Majesty thereupon issued a new warrant, *referring to the former, and saying in effect, "I have had a scheme laid before me, and I approve of it." It seems to me therefore to be as plain as a matter of fact can be, that the Crown in 1826 executed the intention which it professed in 1823, and that it then for the first time approved of a scheme of distribution. Then for the first time it made a final distribution, if up to this hour the distribution be final, a point as to which, upon the authority of the statute construing the prize proclamation, and treating it, though it makes no reference to the future, as if it were still subject to the power and revision of the Crown, I am inclined to entertain doubt. It is said that the trustees were only called upon to make distribution according to the principles chalked out by the minute of the Treasury, and that they were to act merely as calculators. But it seems a most extravagant supposition, and most derogatory to the dignity of the royal functions, that a mere arithmetical operation should be all that was committed to the trustees, and yet that the Crown should reserve to itself the power of approving of this arithmetical operation. The trustees are to submit a scheme framed according to certain principles; but where would be the use of coming back with the result of an arithmetical computation which the Lords of the Treasury were to lay before the Crown? Was it necessary to

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put all this machinery in motion—to apply to the Treasury, and from the Treasury to the Crown, in order that the latter might adopt a result founded on a simple principle of arithmetic? I cannot so read or understand the warrant without doing violence to all sound principles of construction.

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Reference has been made to the case of *Stevens v. Bagwell*,† where that which was a matter of bounty is put *upon the footing of a right. So far to be sure as the question regards the transmission of the right from the grantee, after it has once vested in him, he may sell or assign the bounty; he may transmit it to his heir, or sue for it, and say it has become a matter of right, and is no longer bounty. But is there a shadow of pretence for asserting that, as against the Crown, or against trustees standing in the place of the Crown, prize is a matter of right and not of bounty? Such a decision will be sought for in vain. The only question, and I doubt whether in a matter so purely the creature of the Crown it be a question, is, whether, inasmuch as the arrangement is revocable up to the last moment, the Crown could constitutionally render it irrevocable. But here I can have no doubt; for the instrument, instead of making the grant irrevocable, takes express pains to shew it to be revocable;—if indeed the property be granted at all; which it is not, for the warrant is only an instruction to lay a scheme before the Crown, and after that has been approved, to proceed to invest and distribute.

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Upon these grounds, I entertain no doubt whatever that this question, upon the merits, is wholly beyond the jurisdiction of the Court. Whether the lords of the Treasury came to a rightful decision in 1823, or to a more rightful decision in 1826,—whether the Crown has erroneously or properly, correctly or incorrectly, justly or unjustly, (using the word in a vague sense, for justice is a term improperly applied to an act of mere grace,) come to a decision upon the advice tendered by the Lords of the Treasury, is no question for this place. It is enough for this Court, and for the Court below, that the Crown has given the booty by the instruments before me, and that, notwithstanding anything that had been, or had begun to be, granted three years before, the Crown had a right so to give it.

† 10 R. R. 46 (15 Ves. 139).

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It is said that there is great confusion here ; that the decision giving the property to Lord Hastings, as commander-in-chief, professes to proceed upon one principle, and that the former decision, giving it to Sir Thomas Hislop, under the name of commander-in-chief, proceeds upon another principle. But all such considerations are met by observing, that they are useless and foreign to the question in hand, unless they raise some doubt upon the construction of the instrument. Those who so argue do not pretend to say that this instrument is not plain. It is too plain and too strong for them. Their argument is, that the prize was once given to Sir Thomas Hislop, and now to Lord Hastings, —once to Sir T. Hislop by one royal warrant, and now to Lord Hastings by another, which latter, they contend, affects most inconsistently to proceed upon a recognition of the former. But suppose the first instrument had said, “ the actual captors shall have the booty,” and the second instrument had said, “ whereas it is right to adhere to the first instrument, and that the actual captors should have the booty, and whereas Sir T. Hislop is the actual captor, nevertheless we please to give it, not to the actual captor, but to Lord Hastings, the constructive captor ; ” — that would be much stronger than the present case : nevertheless, if it be clear in the operative part of the grant, whatever the reasons in the recital may be, that the Crown meant to dispose of the property by the last grant, the Crown had the power so to do, notwithstanding this inchoate proceeding, be it inconsistent, be it self-contradictory, or repugnant to the other. If, therefore, it be clear that the Crown so intended, the Crown had the right ; and the Crown having the right, and having exercised it, the appellant can have no title to raise the question here, whether the Crown acted well, or was well and wisely advised in bestowing the bounty upon others.

WALSH v. WALLINGER.†

(2 Russ. & Mylne, 78—82; S. C., Tamlyn, 425; 9 L. J. Ch. 7.)

Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint:

Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund.

THE testator, John W. Arnold Wallinger, by his will, dated the 19th of January, 1805, gave his personal estate to his wife, Matilda, for her own use and benefit, and devised all his real estates to trustees upon trust to sell the same, and, after deducting the expenses of the sale, and paying the incumbrances thereon, and all his just debts, to pay the residue “unto his said wife, to and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him in such manner as she should appoint.”

The testator died on the 23rd of January, 1805, leaving his widow, a son, and eight daughters him surviving.

By an indenture bearing date the 14th of February, 1817, to which John A. Wallinger the son was a party, the mother, in order to place him advantageously in partnership, appointed to him the sum of 1,000*l.*, part of the residuary fund; and it was thereby declared and agreed between her and him, “that he the said John A. Wallinger should not be entitled to any further or other portion or share of and in the residue of the monies arising from the sale of the real estate of John W. Arnold Wallinger deceased, unless the said Matilda Wallinger should, by any deed or deeds in writing, under her hand and seal, or by her last will and testament, make any further appointment or disposition in favour of him the said John A. Wallinger from or out of the same.” This sum of 1,000*l.* was raised and paid to the son.

† *Lambert v. Thwaites* (1886) L. R. 2 Eq. 151, 155, 35 L. J. Ch. 406, 14 L. T. 159.

1830.
Dec. 3, 6.

Rolls Court.
LEACH, M.R.
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Caroline, one of the daughters, died in 1828, without having had any part of the fund appointed to her.

The widow by her will, executed in May, 1828, reciting that two of the daughters were amply provided for, and that her son had already received 1,000*l.*, which was as much as could be spared from the daughters, directed that these two daughters and the son should not have any share in her property, and appointed the residue of the trust monies to her other five surviving daughters in equal shares.

The bill was filed by the five appointees and their husbands, and prayed that the will might be declared a valid execution of the power.

One question in the cause was, whether the widow could appoint to some of the children, totally excluding others.

Mr. Pemberton and Mr. Longley, for the plaintiffs.

Mr. Tinney and Mr. Temple, for other parties in the same interest:

It was the intention of the testator to give his wife * * an absolute power of selection. In *Civil v. Rich*,† the power was to give “to children and grandchildren, according to their demerits:” and a gift of the whole to one was sustained: [*Burrell v. Burrell*,‡ *Kemp v. Kemp*.§]

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Mr. Bickersteth and Mr. Cooke, *contrà*. * * *

THE MASTER OF THE ROLLS:

The question is, whether the words “in such manner as she shall appoint,” import that the widow was to have the power to exclude any of the children, or merely that she was to give the property to them in such shares as she might think fit, and as might best suit their respective circumstances. If the direction had been, that at her death the property should go to the children as she should appoint, all the children, according to decided cases, must have taken. There is no sensible or

† 1 Ch. Ca. 309, and 2 Chan. Rep. 141.

‡ Amb. 660.
§ 5 R. R. 182 (5 Ves. 849).

substantial distinction between such a direction and the expressions which are used here. Therefore, all the children are entitled, who were capable of taking under an appointment by the mother.

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Another question was, whether the personal representatives of Caroline, who died in the lifetime of the widow, were entitled to share in a part of the property which was unappointed by the will of the mother.

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[See *Kennedy v. Kingston*,† *Needham v. Smith*,‡ *Boyle v. Bishop of Peterborough*,§ *Malim v. Keighley*.||]

THE MASTER OF THE ROLLS:

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Unless the interest be expressly given over in case of no appointment, those children only will take who could take by appointment.

The power here was plainly testamentary, and could be executed only in favour of children who could take by will; and the part unappointed must be divided between the children who were living at the mother's death.

* * * * *

HOPKINS v. MYALL.

(2 Russ. & Mylne, 86, 87.)

The defective execution of a power will not be assisted where the defect consists of the non-observance of a provision inserted for the protection of the donee of the power.

1830.
Dec. 10.
Rolls Court.
LEACH, M.R.
[86]

UPON the marriage of Mr. and Mrs. Myall, certain property of the wife was assigned to trustees, upon trust for the wife during her life, for her separate use, with remainder as the wife should appoint by any writing under her hand attested by two witnesses; and for default of appointment, then, after the death of the wife, to the children of the marriage in manner therein mentioned.

The trustees, upon an application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. The wife died without having made any other appointment of the fund.

† 22 R. R. 197 (2 Jac. & W. 431).

§ 2 R. R. 108 (1 Ves. J. 299).

‡ 28 R. R. 107 (4 Russ. 318).

|| 2 R. R. 229 (2 Ves. J. 333).

HOPKINS The present bill was filed by the children after the death of
 MYALL^{c.} the mother, to charge the trustees for a breach of trust, and to
 compel them to replace the fund.

Mr. Bickersteth and Mr. Jacob, for the plaintiffs.

Mr. Rolfe and Mr. Pattison, contra, submitted that this was analogous to the case of an informal appointment, which, though not executed strictly according to the power, would nevertheless be referred to it, and be upheld as an effectual execution in equity, provided the intention to dispose of the fund was clearly manifested: *Blake v. Marnell*,† *Routledge v. Dorril*.‡ The general
 [*87] rule was, that if a trustee, who holds a fund in his *hands, pays it over to a third party by the direction of the cestui que trust, such payment cannot be afterwards recovered back from the trustee, and no authority could be found which raises any exception in favour of a *feme covert*: *Pollard v. Greenvil*,§ *Wright v. Englefield*,|| *Moodie v. Reid*.¶

THE MASTER OF THE ROLLS:

The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, and are matters of substance, and not of form; and without an adherence to those ceremonies the interests of the children could not be defeated.††

WEAVER v. MAULE.‡‡

(2 Russ. & Mylne, 97—101; S. C. 9 L. J. Ch. 20.)

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of B.

+ 12 R. R. 68 (2 Ball & B. 35).

† 2 R. R. 250 (2 Ves. J. 357).

§ 1 Ch. Ca. 10.

|| Amb. 468.

¶ 16 R. R. 257 (1 Madd. 516).

†† *Cocker v. Quayle*, 32 R. R. 275
 (1 Russ. & My. 535).

‡‡ *Gallard v. Hawkins* (1884) 27 Ch. D. 298, 53 L. J. Ch. 834, 51 L. T. 689; and see *The Trustee Act*, 1893, s. 29 (b), and *The Intestates' Estates Act*, 1884, s. 4, concerning the escheat of equitable interests in real estate.—O. A. S.

1830.

Dec. 13, 17.

Rolls Court.
 LEACH, M.R.

[97]

and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to A.; B. was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

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Held, that the lord did not become entitled to the tenement by reason of failure of heirs of B., and that A. had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be readmitted as tenant in fee according to the custom of the manor:

That it was the personal representative of B., and not the lord, who was entitled to receive the mortgage debt.

THE plaintiff, being seised to him and his heirs of a certain tenement according to the custom of the manor of Taunton Dean, in the county of Somerset, borrowed the sum of 700*l.* of one John Ball, and for securing the repayment of the same, he, on the 12th of May, 1824, duly surrendered the tenement into the hands of the lord of the manor, to the use and behoof of John Ball and his heirs and assigns for ever, according to the custom of the manor, subject nevertheless to the trusts, declarations, and agreements mentioned and contained of and concerning the tenements, in a certain indenture, bearing even date with the surrender, and made between the plaintiff of the one part and John Ball of the other part. Upon this surrender John Ball was duly admitted. By the indenture therein referred to, it was agreed between the plaintiff and John Ball that the tenement should be held and enjoyed by Ball, his heirs and assigns, according to the custom of the manor, upon trust that Ball, his heirs and assigns, might at any time, after giving one year's previous notice in manner therein mentioned, sell and dispose of the tenement, and, by and out of the monies arising from such sale, and the rents and profits of the premises in the meantime, in the first *place pay and discharge all rates, taxes, and lord's rents, and all expenses to be incurred in keeping the premises in repair, and in assuring the same against fire, and all expenses incurred in the sale, and should, in the next place, pay off and discharge the sum of 700*l.*, and all interest due thereon, and should pay over the surplus monies, if any, to the plaintiff, his executors, administrators, and assigns.

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In the month of August, 1825, John Ball died intestate and

WEAVER without an heir ; and administration of his personal estate and
MAULE. effects was granted to the defendant George Maule on the
nomination of the Crown.

The mortgage premises had not been sold, nor had any notice been given by Ball, in his lifetime, of an intention to sell them, and at his death the sum of 700*l.*, with an arrear of interest, remained due to him. Soon after the death of John Ball, William Kinglake, the lord of the manor of Taunton Dean, caused proclamation to be made at three several courts for the heir of John Ball to come in to be admitted to the tenement ; and, no heir having appeared, he issued a warrant of seisin of the tenement, claiming to be entitled to the same by reason of the failure of heirs of John Ball. The plaintiff then filed the present bill against William Kinglake and George Maule, praying to have it declared that he was entitled to the equity of redemption of the copyhold tenement.

There were two questions in the cause.

I. Whether, under the circumstances, the plaintiff had an equity of redemption as against the lord, and was entitled, upon payment of the 700*l.* and interest, to be re-admitted to the copyhold tenement.

[99] II. If the mortgagor had a right to redeem, who was entitled to receive the mortgage money ; the lord, or the personal representative of the mortgagee.

Mr. Bickersteth and *Mr. Jacob*, for the plaintiff.

Mr. Tinney and *Mr. B. Parry*, for the lord of the manor.

[For the plaintiff, *Paulett's case*,† *Attorney-General v. Reeve*,‡ *Burgess v. Wheate*,§ and *Henchman v. Attorney-General*,|| were cited.]

On the other hand, it was contended, on behalf of Mr. Kinglake, that the lord of a manor could not be affected by any trust to which he was not an assenting party : *Peachy v. Duke of Somerset*,¶

† Hard. 465.

‡ 2 Atk. 223.

§ 1 Ed. 177 ; 1 W. Black. 123.

|| 25 R. R. 255 (2 S. & St. 498 ; reversed in 1834, 3 My. & K. 485).

¶ 1 Strange, 447.

Howard v. Bartlet.† The entry of the trust upon the court rolls was the unauthorised act of the steward, unknown to the lord, who ought not therefore to be bound by it; especially as upon the recent cases it was extremely doubtful whether, if a tenant made an application for that purpose, the steward had any power or discretion to refuse compliance.

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Mr. Wray, for the Crown.

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THE MASTER OF THE ROLLS :

In the case of fee simple lands, the lord, taking by escheat, is subject to the charges and incumbrances of the tenant, because the tenant has full power to create them without the consent of the lord. But in the case of copyholds and customary freeholds, where the title depends upon admission, the lord, taking by escheat, is not subject to the charges and incumbrances, or alienation of the tenant, unless by act of admission he has expressly assented to them. In the present case the tenant surrenders the land into the hands of the lord, to the intent that a new tenant may be substituted in his place, subject to the trusts, declarations, and agreements expressed in a certain indenture, referred to in the surrender; and when the lord admits the new tenant upon such surrender, he is to be considered as thereby assenting to the qualified nature of his tenure, and cannot afterwards claim against those trusts, declarations and agreements, to which he has thus given his consent.

*Whether he were, or were not, actually acquainted with the nature of the trusts and agreements contained in the indenture, is immaterial. The terms of the surrender gave him full notice of the trusts, and it was his duty to inform himself of their nature.

[*101]

The lord, in this case, therefore, being to be considered as bound by the trusts of the indenture, becomes himself a trustee for the purpose therein mentioned, and the plaintiff, as against the lord, is entitled to the usual decree to redeem, inasmuch as the equity of redemption still subsists under the indenture, no

† Hob. 181.

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notice having been ever given by the mortgagee, so as to acquire the right of exercising the power of sale.

The question remains between the lord and the defendant, the personal representative of John Ball, which of them is to receive the money to be paid by the plaintiff upon the redemption. The lord, having by his admission upon the surrender consented to the mortgage, it follows that the mortgage money is part of the personal estate of the mortgagee, and is to be received by his administrator.

The decree must, therefore, be to continue the injunction restraining the lord from all further proceeding at law to recover possession of the customary tenement; to declare that the plaintiff is entitled to redeem as against both defendants; to direct the usual account of what is due upon the mortgage, and that, upon payment of what shall be so found due to the defendant, the administrator of Ball, the lord do regrant the tenement to the plaintiff, to be held to him and his heirs, according to the custom of the manor, as upon his former admission, he paying to the lord, or his steward, the fine and fees due upon his admission. Considering the novelty of the case, let the decree be without costs.

1830.

Dec. 21.

Rolls Court.

LEACH, M.R.

On Appeal.

1831.

Nov. 16, 18.

1832.

Jan. 25.

Lord

BROUGHAM,

L.C.

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MONYPENNY v. BRISTOW.†

(2 Russ. & Mylne, 117—136; S. C. 1 L. J. (N. S.) Ch. 88.)

Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after-purchased property, notwithstanding a more general intent indicated in its recital.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That as the defence of the Statute of Limitations was not raised upon

† *Phillips v. Homfray* (1883) 24 Ch. D. 439, 59 L. J. Ch. 833, 49 L. T. 5.

the pleadings, the account should be taken from the time when the plaintiff's title first accrued ; and,

That the plaintiff was not at liberty to set off the amount of the rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the plaintiff was devisee.

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BRISTOW.

JAMES MONYPENNY by will, bearing date the 11th of February, 1804, and duly attested, after confirming his marriage settlement, whereby certain lands were settled on his wife for her jointure, gave and devised to his said wife, as a further provision, certain lands in the parishes of C. and T. for her life : he then gave and devised certain other lands in the parishes of G. and M. to his brother Thomas Monypenny for life, with remainder to the second son of the said Thomas for life, and to his first and every other son in tail ; and he devised certain other lands in C. unto his brother Robert Monypenny for life, with remainder to the son of the said Robert for life, and to his first and every other son in tail ; and he gave and devised his house, called Maytham Hall, and the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, and expectancy, except as before devised, unto his brothers Phillips Monypenny, Robert Monypenny, *and Thomas Monypenny, and their heirs, upon trust, within six months after his decease, to sell or dispose of so much of his said last devised estates as should be sufficient to pay off and discharge all his just debts and legacies, and also his funeral and testamentary expenses, it being his express will and desire that his personal estate should be wholly freed and discharged from all payments and demands whatsoever ; and subject thereto, he devised the same to his brother, Phillips Monypenny, for life, with remainder to his first and every other son successively, in tail male, with divers remainders over ; and he gave, devised, and bequeathed to his said brother Phillips Monypenny, his heirs, executors, and administrators, all his real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney.

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The testator, by a codicil bearing date the 25th July, 1818, which was duly executed and attested, and which he declared to be a codicil to his will, and desired might be taken as a part

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BRISTOW.

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thereof, after reciting the devise which by his will he had made of the lands in the parishes of C. and T. to his wife for life, continued as follows: "And whereas I am desirous of making a more liberal provision for my said wife, and that she may enjoy the whole of my lands, tenements, and real estates for the term of her natural life, and take my personal estate absolutely, now, therefore, I do hereby confirm the said hereinbefore recited devise; and I do further give and devise unto my said wife, during her life, all those my lands, &c., in the parishes of G. and M., and also all those my lands, &c., in C. aforesaid" (which the testator recited he had by his said will devised to his brothers Thomas and Robert, and their children respectively); "and I direct that the estate for life, hereby devised to my said wife in my said lands, *and situated in the several parishes of G., M., and C., shall vest in possession immediately after my decease, and take precedence of the several estates thereof respectively devised or limited by my said will." The testator then, after the decease of his wife, gave and devised the said lands, &c., so thereby devised to her for life, to such and the same persons, for such and the same estates, and upon such and the same trusts respectively, as would have taken the same by virtue of his said will; and after reciting, that by his said will he had given and devised his house called Maytham Hall, and also all the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, or expectancy, except as before devised, unto his three brothers and their heirs upon trusts therein expressed, he revoked the said last-recited devise; and thereby gave and devised his house called Maytham Hall, and all other his real estate whatsoever which he had by his said will devised to his said three brothers upon the trusts therein mentioned, unto Robert Monypenny, William Forbes, C. Willis the elder, and C. Willis the younger (whom he also named his executors), and their heirs, upon trust, after his decease, to sell and dispose of such parts thereof as might be necessary for raising and paying his debts, legacies, funeral and testamentary expenses, and the expenses of their executorship, it being his express will and desire that his said real estate should alone stand charged therewith, and that his personal estate should be freed and

discharged therefrom; and subject thereto, upon trust for his said wife during her life, and after her decease upon such and the same trusts as were declared of the real estate by his said will devised to the said Phillips Monypenny, Thomas Monypenny, and Robert Monypenny, and their heirs by his said will, immediately subsequent to the power of sale in that behalf contained. *The will then proceeded thus: "And whereas by my said will I have given, devised, and bequeathed to my said brother Phillips Monypenny, his heirs, executors, and administrators, all and every my real, copyhold, and leasehold estates in or near the town of Birmingham, and in the parish of Hackney; now I do hereby revoke the same devise and bequest, and do hereby give, devise, and bequeath all and every my said estate, so given to the said Phillips Monypenny as hereinbefore lastly recited, unto my said wife for the term of her natural life; and immediately after the decease of my said wife, I give and devise the same unto my brother Phillips Monypenny, his heirs, executors, and administrators, absolutely for ever."

MONYPENNY
Bristol.

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In a subsequent part of the same codicil the personal estate was given to Mrs. Monypenny, clear of debts and legacies; and it was provided that whatever debts and legacies she paid, should be repaid to her with interest, by sale of a sufficient portion of the real estate charged therewith. By an unattested codicil of later date, she was nominated an executrix of the will, to act in conjunction with the executors already appointed.

Subsequently to the execution of the will, but prior to the date of the first codicil, the testator acquired two freehold houses in Birmingham; and on the 3rd of June, 1822, he died, leaving the said Phillips Monypenny, his heir-at-law, and his widow, Mary Monypenny, surviving. The trustees and executors, with the exception of Robert Monypenny, executed a disclaimer of the trusts, and also renounced probate of the will. The will and codicils were proved by the widow alone; and upon the notion, which all parties appear to have entertained, that under the devise in the first codicil Mrs. Monypenny took a life-interest in the whole of the testator's real property, she obtained the *custody of the title deeds, and was let into possession of all the real estates, including those charged with the payment of the debts

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v.
BRISTOW.

and legacies, and the two after-purchased tenements in Birmingham, and she continued, with the full knowledge of the heir-at-law, in the undisturbed possession and enjoyment of those estates as long as she lived. On the 5th of December, 1826, Mrs. Monypenny died, having paid debts and legacies to a large amount, which had not been repaid to her at her death.

The amended bill was filed on the 4th of December, 1829, by Phillips Monypenny, the heir-at-law, and Robert Monypenny, the sole acting trustee, and also the executor of the testator, against Mrs. Monypenny's personal representative; and it prayed, among other things, that the title deeds of the real estates subjected to the charge might be delivered up,—that the testator might be declared to have died intestate with respect to the two after-purchased houses in Birmingham,—that an account might be taken of the rents and profits thereof during the time Mrs. Monypenny had continued in possession, and that the plaintiff, Phillips Monypenny, might be at liberty to set off against what should be found due from the defendant on that account certain sums of money, which the bill stated to be due from the plaintiff to the estate of Mrs. Monypenny, in respect of her disbursements as the executrix of her husband, the plaintiff submitting, that if upon the result of the account a balance should be found due to the defendant, a sufficient sum for the payment thereof should be raised by sale or mortgage of a portion of the real estates charged. The answer of the defendant did not set up the Statute of Limitations as a bar to any part of the demand.

Mr. Pemberton and Mr. Barber, for the plaintiff.

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Mr. Tinney and Mr. Goodeve, for the defendant:

The first point argued was, whether under the words of the will and codicil Mrs. Monypenny was entitled to the rents of the houses at Birmingham during her life.

The MASTER OF THE ROLLS decided that the houses at Birmingham did not pass to Mrs. Monypenny.

It was then argued for the defendant that, as Mrs. Monypenny had been let into possession * * with the assent and appro-

bation of the plaintiff, the latter was not now entitled to be relieved against the consequences of his own error, more especially in a case where he had every means of informing himself of his rights, and the error was purely one of law: *Bilbie v. Lumley*,† *Brisbane v. Dacres*,‡ *Skyring v. Greenwood*,§ *Andrew v. Hancock*,|| *Bramston v. Robins*.¶ It was farther contended, that these rents being wrongfully received by Mrs. Monypenny, could have been recovered in her lifetime only by an action of trespass, and that this action, being founded in tort, died with her, so that the rents were no longer recoverable by the plaintiff. * * *

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For the plaintiff reliance was placed on *Hambly v. Trott*†† and *Pulteney v. Warren*.‡‡

THE MASTER OF THE ROLLS :

The general principle which governs cases of this kind is stated in *Hambly v. Trott*.†† In that case Lord MANSFIELD, after citing a case from Sir Thomas Raymond, in which an executor was held not to be chargeable in tort for a wrong done by his testator, expresses himself in the following manner: “ Sir Thomas Raymond adds, *vide Saville*, 40, a difference taken. That was the case of *Sir Henry Sherrington*, who had cut down trees upon the Queen’s land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, MANWOOD, J., said, ‘ In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction *of the injury done, there his executor shall not be liable.’ These are the words Sir Thomas Raymond refers to. Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where besides the crime property is acquired which benefits the testator, there

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† 6 R. R. 479 (2 East, 469).

¶ 29 R. R. 493 (4 Bing. 11).

‡ 14 R. R. 718 (5 Taunt. 143).

†† Cowp. 371.

§ 28 R. R. 264 (4 B. & C. 281).

‡‡ 5 R. R. 226 (6 Ves. 72).

|| 21 R. R. 569 (1 Brod. & B. 37).

MONYPENNY ^{r.}
BRISTOW. an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." Therefore where the trespasser commits an injury, without benefit to himself, and dies, then the action dies with the person. But where the injury is attended with a profit to the trespasser, there the party may waive the tort, and bring an action of *assumpsit* against the executor for the value of the property taken by the trespasser.

It is truly said, that the title to land cannot be tried in an action for money had and received; but this is to be understood of cases where the present right to land is in question, and not cases where the question applies only to past-gone rents. If the plaintiff had proceeded against Mrs. Monypenny in her lifetime, and during her possession of the land, he could not have sustained the action for money had and received, but must have proceeded by ejectment, for there the title to the land would have been in question. This distinction governed the late case of *Pearce v. Day*† before Lord Tenterden, where after the death of a bankrupt, who had been *tenant for life of certain property, his assignees recovered, in an action for money had and received, the past-gone rents of his life-estate from a person who had received them under colour of a fraudulent mortgage deed. An action for money had and received may be brought to recover the profits of an office, although the defendants set up a title to them.

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I am of opinion, however, that the plaintiff cannot, upon the principle of set-off, claim to be allowed the amount of the rents thus received by Mrs. Monypenny against the demand of the defendant for the debts and legacies paid by that lady, because the sums which she has so paid do not form a personal demand against the plaintiff.

If an action at law had been brought by the plaintiff Monypenny against Bristow to recover these rents, and Bristow had not at law pleaded the Statute of Limitations, Monypenny would have recovered the full amount of the rents received beyond the six

† Tried at the London sittings after Hilary Term, 1826.

years: and as Mr. Bristow has not in this suit in equity set up the statute, the plaintiff is entitled here to the full amount of the rents received by Mrs. Monypenny.

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v.
BRISTOW.

The defendant appealed from so much of his Honor's decree as declared that the two houses in question did not pass to the widow by the first codicil, and that her representative was bound to account for the rents and profits thereof received by her in her lifetime.

1831.
Nov. 16, 18.

Mr. Tinney and Mr. Goodere, for the appellant:

* * The rents were paid to the widow under a common error, against which, it being an error of law, there can be no relief: *Bramston v. Robins.*†

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Sir E. Sugden and Mr. Barber, in support of the decree. * * *

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THE LORD CHANCELLOR, [after stating the question, and reading the material part of the codicil, and affirming the decree on the first point, continued as follows:]

1832.
Jan. 25.

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Thus far upon the point of republication, which after all is but a secondary question, the main contention being whether the executor of Mrs. Monypenny shall account for the rents of those after-acquired houses which during her life she held without a title, possessing them, not adversely, nor as the bailiff of the owner, and accountable to him (for the owner was ignorant of his rights), nor yet under any contract, hardly even by sufferance, but, as it is alleged, under a mistake in law. Upon this point, I confess, I have felt a great deal of difficulty; but, after the best consideration *I have been able to give, and having regard to the peculiar circumstances of the case, I am, on the whole, inclined to agree with his Honor upon this part also of his judgment, and to decide that the personal representative of Mrs. Monypenny is bound to account for the rents. The leaning ought clearly to be towards making him an accounting party. The niceties at law upon this subject are illustrated in the well known case of

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† 29 E. R. 493 (4 Bing. 11).

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v.
BRISTOW.

Hambly v. Trott, where Lord MANSFIELD lays down the doctrine that tort or trespass will not lie against an executor; but that where, besides the crime, property is acquired which benefits the testator, an action for the value shall survive, and that, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged. The judgment, however, in *Hambly v. Trott* does not assist us much, for the question in that case was, not whether the remedy lies against the executor, but whether it lies against the party in his lifetime? Here, on the other hand, there was no ejectment, and consequently no action for mesne profits brought in Mrs. Monypenny's lifetime, as she died before the mistake was discovered.

Upon the whole, although I do not see my way clearly amidst the apparent conflict of *dicta* and authorities upon this point, I can find no satisfactory reason to justify me in reversing the judgment of the Court below. I shall affirm the decree without costs, and direct the deposit to be returned.



1831.
Jan. 17, 18,
22.
June 13.
—
Lord
BROUGHAM,
L.C.
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MONKTON v. ATTORNEY-GENERAL.†

(2 Russ. & Mylne, 147—167; on appeal, 10 Cl. & F. 471.)

Where, in a pedigree case, the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C.

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence, upon which the Court will direct an issue to investigate a title depending on a question of pedigree.

[THE following passages from the LORD CHANCELLOR's judgment in this case are sufficiently explained by the references made in the judgment to the facts of the case. The object of the claimants was to establish their relationship to a deceased person (Samuel Troutbeck) whose estate in default of next-of-kin passed to the Crown.

† *The Lovat Peerage* (1885) 10 App. Cas. 763.

The evidence of relationship consisted chiefly of a document which is fully referred to in the judgment.

MONKTON
P.
ATT.-GEN.
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The general nature of the arguments urged on behalf of the Crown may be collected from the judgment of the LORD CHANCELLOR.]

THE LORD CHANCELLOR :

Jan. 22.

After giving the fullest attention to the case, especially upon the matters of law which alone seem to require any particular deliberation, I have come to the conclusion, that I ought in this case to direct an issue.

The grounds of the argument and of my opinion resolve themselves principally into two ; that which relates to the admissibility of certain evidence, and that which relates to the facts, including that evidence, namely, the weight of it, if admitted, and the other evidence in the cause.

The first consideration arises upon a document purporting to be an account prepared by a person of the name of John Troutbeck, a good many years ago deceased, who from his own knowledge of the family, from communications with some of its members, and from the best information he was able to obtain, appears to have digested and to have reduced into writing an account of all that he could learn, and therefore believed to be true, respecting his own relations.

The principal point in dispute was the relationship of two individuals of the names of Samuel and George *Troutbeck. John was clearly proved to have been related to one of those two, namely, to George : he was not proved—and that was as much in dispute as the relationship of Samuel and George—he was not proved to have been related to the family of Samuel ; and this documentary account was objected to, as not falling within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence *dehors* the declarations, to connect them with the parties respecting whom the declarations are to be tendered.

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I entirely agree, that in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations,

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ATT.-GEN.

connect the person making them with the family. But I cannot go the length of holding, that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence, (as in one of the settlement cases referred to, where the very place of birth was sought to be proved, and Lord ELLENBOROUGH held they were not for that purpose receivable†), but declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died,‡ or whether they are actually dead;—every thing in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by *evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered.

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To say that you cannot receive in evidence the declaration of A., who is proved to be a relation by blood of B., touching the relationship of B. with C., unless you have first connected him, also by evidence *dehors* his declaration, with C., is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity, that if, in order to connect B. with C., I am first to prove that A. is connected with B., and then to superadd the proof that he is connected with C., I do a thing which is vain and superfluous; for then the declaration is used to prove the very fact, which I have already established; inasmuch as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and from the total want of any contrary authority in adjudged cases, or in the *dicta* of Judges or text-writers, that the argument fails entirely, which would limit

† *Rex v. Erith*, 8 East, 539.

‡ See the following case of *Kidney v. Cockburn*, p. 47, below.

the rule respecting evidence of this description to a greater extent than by requiring you to connect with the family, by matter *dehors* the declaration itself, the party whose declaration you receive.

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ATT.-GEN.

Neither can I accede to another limitation, for which an argument was attempted to be raised, that the declarations themselves must be looked at, to see whether they are contemporaneous or not. I do not understand this restriction, now for the first time sought to be engrafted upon the rule, but I understand very well how absurd it would be, if introduced; how completely it would *defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. A person's declaration that his grandmother's maiden name was A. B. has never till this time been questioned as admissible, although it cannot by possibility be what is called a contemporary declaration, because no man can by possibility have contemporary knowledge of what his grandmother's name was before she was married. If, therefore, the word "contemporary" is to be added as a term of qualification to the subject-matter of a declaration, in order to make it competent evidence, all such declarations would then clearly be excluded as to facts, however well known in the family, which are the common matter of such evidence, and in cases of pedigree you never could go farther back than the recollection of the party swearing to the declaration of the deceased, and the life since the years of discretion, or the years when memory begins to operate, of that deceased person; a restriction which has never been acted upon by any Judge, or sanctioned by any text-writer, and never to my knowledge before contended for at the Bar.

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It is then asked, shall we have no restriction whatever upon the admissibility of such evidence in respect of the subject-matter? I have already stated one important restriction, arising from the position in which the party whose declaration is received must necessarily stand to the family. Having once shewn him to be a member of the family, by matter *dehors*, you may admit his declaration as to the relationship of any member of that family with any other, or as to the question (which comes to the

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same thing), whether a certain person is a relation of that family.

But is there no further restriction touching the subject-matter, and touching the manner in which the declaration is made? Clearly there is, and nothing can be more satisfactory, or more consistent with good sense, or with legal principle and decided cases, than the summary of the doctrine given by Lord ELDON in *Whitelocke v. Baker*.† His Lordship there observes, that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or to fall short of it. I entirely agree that the words must be the natural effusion of the party, and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood (for that would equally bias), *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

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With the exception of what is said in *Drummond's* case,‡ where the evidence was clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it. Lord TENTERDEN in *Doe v. Turner*,§ *states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that if the son was entitled to the peerage then, the husband ought to have been a peer likewise. A stronger instance of similarity

† 9 R. R. 216 (13 Ves. 511, 514).

§ Ry. & Mo. 142.

‡ 1 Leach's Crown Cases, 378.

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of situation than this can hardly be conceived, and the case certainly seems to go a great way. But without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration.

One restriction, however, clearly must be imposed; the declarations must be *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord ELDON calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances, that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitelocke v. Baker*. There is a still more distinct authority in the *Berkeley Peerage* case,† where Mr. Justice LAWRENCE adopts almost the very language of Lord ELDON in *Whitelocke v. Baker*, and where, proceedings in equity having been instituted to *perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*.

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Subject to that limitation, therefore, the rule as to declarations is to be taken. And regard must also be had to the occasion on which the party has emitted them. Whatever applies to the evidence of a witness spoken in the box applies equally to written declarations, provided they are brought home to the person supposed to have made them. Till then they are not declarations of one connected with the family. The occasion upon which the declaration is made is, therefore, to be taken into the account.

It was then asked, as an argument for a further restriction of the rule, "If a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration,

† 14 R. R. 782 (4 Camp. 401).

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when, *non constat*, he may not have been in the act of making evidence for himself, by preparing a document which should afterwards profit him, or those in whom he is interested?" To that I answer, shew me that the pedigree in question was prepared with that view. Bring it within the rule either of *Whitelocke v. Baker* or of the *Berkeley Peerage* case; prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; shew me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be (and so far I agree with the argument for the Crown), Was the evidence in the particular circumstances manufactured, or was it spontaneous and natural?

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*If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should of course at once have rejected it. But upon looking at it and examining it, I cannot, upon the whole, bring my mind to say that it was fabricated in such circumstances, or with such a view, as should bring it within the principle adverted to.

The competency of a pedigree as evidence in such questions has been frequently made the subject of comment, and even of judicial decisions.

One simple form of pedigree, or rather the heads of memoranda furnishing materials for a pedigree, is constantly admitted by every day's practice, I mean entries in family Bibles or other books kept in the family. A memorandum book, an old almanack for instance, which is not so much open to all the members of the family as a family Bible is, has upon one occasion been received: but a family Bible is open undoubtedly to the family; which may be one ground of its admissibility; and I also find, on the authority of Lord MANSFIELD, that a pedigree is admissible to prove the facts contained in the pedigree, if it be hung up in the family mansion. A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an

inscription upon a tombstone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence.

MONKTON
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It is urged, however, and with considerable plausibility, that the principle of all these cases would exclude such a pedigree as this, which was not hung up or in any way made public, and to which it is not pretended that any one had access except the writer himself. But why is it that the publicity is relied upon in those cases? *Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because, in all these cases, the publicity supplies a defect, there existing, but not here existing,—the want of connection between the pedigree, the tombstone, the ring, or the Bible, with particular individuals, members of the family. Why is it, for example, that a pedigree hung up in the family mansion is good evidence, although the person who made it is unknown, and is not proved by matter *dehors* the document itself, to have been connected with the family? Simply because of its being hung up in the mansion, where, the presumption is, it would not be suffered to remain, if the whole of the family did not more or less adopt it, and thereby give it authenticity. It is for that reason you admit such a pedigree without knowing who may have been the author. The present question, however, is simply this, Whether the pedigree would not be admissible if, instead of being publicly hung up, it were kept in the repositories of one of the family, provided you can shew that it is in the handwriting of a member of that family? In this respect the case before me is clearly distinguishable from those which appear to require the publicity of the document in order to make it competent evidence.

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Adverting more particularly here to the authority of Lord MANSFIELD in *Goodright v. Moss*,† “An entry in a father’s family Bible,” says his Lordship, “an inscription on a tomb-stone, a pedigree hung up in the family mansion, are all good evidence.” What follows clearly shews that Lord MANSFIELD did not consider publicity *indispensable, and it is equally clear that he did not

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† Cowp. 591.

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consider the circumstance of a man who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, provided that object be not connected with a controversy touching the matter in question, a sufficient ground to exclude such evidence. His Lordship's words are, "I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance." This may be said, perhaps, to be going great lengths; but at all events it sanctions the doctrine, that the having a distinct object in view, in making a declaration in writing or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient, *per se*, to exclude that declaration; for, continues Lord MANSFIELD, "If the credit of such declarations is impeached, it must be left to the jury to judge of it." In plain terms, if a father or a mother make a pedigree for the purpose of preventing disputes in the family, his Lordship says he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest, but to preserve a constat, as it were, on record of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay declarations); and the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the Judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the Court.

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Another restriction was a good deal pressed, that you cannot mount, as it were, an hearsay upon an hearsay; *but that what is given in evidence as hearsay must only be of the first degree, so to speak; in other words, that after connecting A. with the family, it is competent, after his death, to give in evidence declarations made by A. as to what came within his own personal knowledge, but not declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal

knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject-matter of that tradition can be perpetuated in testimony. * * *

MONKTON
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ATT.-GEN.

Two issues were accordingly directed to try the question whether the claimants were the next of kin of *Samuel Troutbeck. The issues were tried at the York Spring Assizes in 1831, when the jury found a verdict for the Crown.

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A motion was subsequently made for a new trial; but the LORD CHANCELLOR, after hearing *Sir E. Sugden*, *Mr. Pollock*, *Mr. Blackburn*, and *Mr. Starkie* in support of the application, refused to disturb the verdict.

June 13.

KIDNEY v. COCKBURN.†

(2 Russ. & Mylne, 167—174.)

Semble, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.

1831.
July 15, 21,
31.

Lord
BROUGHAM,
L.C.
[167]

IN this suit, which was instituted for the specific performance of a contract for the purchase of certain freehold premises in the city of London, an important point respecting the extent to which hearsay evidence is admissible in cases of pedigree was very fully considered. The question arose upon the title of the plaintiff claiming as heir-at-law of a lady of the name of Christian Kidney who died in 1826; and in order to make out his title in that character, it became necessary for the plaintiff to shew that John Kidney the plaintiff's grandfather, and David Kidney the grandfather of Christian Kidney, who were admitted to have been the sons of one Jonathan Kidney of Market Harborough, were born of the same mother. By an order of his Honor the Vice-Chancellor, affirmed by the LORD CHANCELLOR

† *In re Turner* (1885) 29 Ch. D. 985, 53 L. T. 528.

KIDNEY
 v.
 COCKBURN.

[*168]

on appeal, the parties were directed to proceed to a trial in the Court of Common Pleas upon the following issue: "Whether John Kidney and David Kidney, children of Jonathan Kidney, were brothers of the whole blood." Upon the trial it was established that Jonathan had been twice married; that his first wife died in March, 1693, and his *second wife in November, 1703; and for the purpose of shewing that his sons, David and John, must have both been children of the first marriage, there were tendered in evidence, first, as to David (whose burial appeared from the parish register to have taken place on the 23rd of December, 1750), certain inscriptions, one on an old tomb-stone in the cemetery, the other on a monumental tablet in the church of Market Harborough, wherein David was stated to have died on the 16th of December, 1750, at the age of 64 years. There were then tendered, as to John (who according to the entry in the parish register was buried on the 9th of February, 1760), various declarations made by a deceased grandson of John, and also a letter written by the same grandson many years ago and sent by post to his brother the plaintiff, stating that John their grandfather was seventy years of age when he died. The issue was tried before Chief Justice Tindal, who refused to receive the inscriptions, declarations, and letter, on the ground that, although admissible for the purpose of shewing the relationship, they were not admissible as evidence to prove the ages of the several parties referred to therein, these being facts which the learned Judge was of opinion could not be proved by hearsay. The jury found for the defendant; and his Lordship, as appeared from his note, was satisfied with the verdict, provided he was right in rejecting the evidence above stated; but the note added, that if such evidence of the age at which the two children of Jonathan died ought to have been admitted and was believed by the jury, there would then be no doubt that John Kidney and David Kidney were brothers of the whole blood.

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Sir E. Sugden, Mr. John Campbell, and Mr. Wakefield, moved for a new trial [cited *Vowles v. Young*,† *Higham v. Ridgway*,‡ and other cases.]

† 9 R. R. 154 (13 Ves. 140).

‡ 10 R. R. 235 (10 East, 109).

The *Solicitor-General* and *Mr. Cockburn*, *contra* [cited *Whitelocke v. Baker*.†]

KIDNEY
v.
COCKBURN.
[170]

The LORD CHANCELLOR at the close of the argument intimated a very strong opinion in favour of the admissibility of the evidence, but said that as the point was one of some nicety he should reserve his judgment till he had time to consider it farther.

His Lordship stated that his original impression was strengthened by the result of his farther consideration, *and by the concurring opinions of Mr. Justice PARK and Mr. Justice LITTLEDALE, to whom he had submitted the point; but as the decision was a matter of great importance, with a view to future cases, he had come to the resolution of sending the question to the Judges of the Court of King's Bench, in the form of a case for their opinion.

July 31.
[*171]

The cause was soon afterwards compromised, so that no farther proceedings were had.

STANTON v. HALL.‡

(2 Russ. & Mylne, 175—182; S. C. 9 L. J. Ch. 111.)

A devise of lands to trustees upon trust, to pay the rents and profits to J. H. for life, but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of J. H. an annuity of 100*l.* during his life, and after his decease, an annuity of 30*l.* during her widowhood, and upon certain other trusts as to the residue for the children of the marriage:

Held, that the annuity of 100*l.* was not the separate estate of the wife, but passed by the husband's assignment to a purchaser for value; and, that as against such purchaser, the wife had no equity for a settlement out of the annuity.

JOHN HALL the elder devised to trustees certain messuages, tenements, and hereditaments, whereof he was seised in fee, to hold the same unto the said trustees and the survivor of them, and the heirs of such survivor, upon trust to pay and apply the

† 9 R. R. 216 (13 Ves. 511, 514). 491, 60 L. J. Q. B. 233, 64 L. T.
‡ *Surman v. Wharton*, '91, 1 Q. B. 866.

1830.
Dec. 13, 15.
1831.
Jan. 21, 22,
24.
—
Lord
BROUGHAM,
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STANTON
v.
HALL.

rents, issues, and profits of the said messuages, &c., into the proper hands of his son John Hall, or to permit and suffer his said son to take and receive the said rents, issues, and profits, to and for his own use and benefit for his life, but so as the same should not be assignable by him or liable to his debts or engagements; and in case his said son should at any time become insolvent, and execute any assignment or other instrument for the benefit of his creditors; or should commit any act of bankruptcy, and be thereupon declared a bankrupt; or should assign over the said rents; then out of the rents, issues, and profits of his said messuages, &c. to pay and apply one annuity or clear yearly sum of 100*l.* unto the wife of his said son, in case she should be living, upon any of such events as aforesaid happening; the said annuity or yearly sum to be paid to her or her assigns for the term of the life of his said son; and after the death of his said son, upon trust to pay and apply one annuity or yearly sum of 30*l.* to her and her assigns, so *long only as she should continue his widow. And after any of such events as aforesaid happening, and subject to such annuities and charged therewith, the said trustees were to stand seised and possessed of the said hereditaments and premises, upon trust for all and every the children of his said son, in manner therein mentioned, with benefit of survivorship and accruer, &c.

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On the death of the testator, John Hall the younger was let into possession of the devised estates. During his continuance in possession, he represented himself to be the absolute owner of the property; and in that character executed a deed, purporting to convey the fee-simple of the devised estates to a mortgagee; a fraud which he was enabled to practise the more easily, as he bore the same name with his father the testator, and suppressed all mention of the will. Some time afterwards, John Hall the younger took the benefit of the Insolvent Debtors Act; and this suit being then instituted by the incumbrancer for the purpose of enforcing his security over all the interest, whatever it might be, which John Hall the younger took under the devise, the question came ultimately to be, whether, in the event which had happened of John Hall's insolvency, his wife, upon the true construction of the father's will, was entitled to the annuity of

100*l.* to her sole and separate use, or whether it belonged to her husband, and was therefore in equity affected by the mortgage?

STANTON
v.
HALL.

A motion was made on behalf of the plaintiff, that some person might be appointed to receive the annuity during the pendency of the suit; but the VICE-CHANCELLOR refused the motion, at the same time intimating an opinion that, upon the words of the will, the wife must be considered as entitled to the annuity for her sole and separate use.

The application for a receiver having been renewed before the Lord Chancellor, it was agreed, after some discussion, that as there was no evidence to be adduced in the cause, it would be expedient, for the sake of avoiding delay and expense, to argue the question upon the merits, and to consider the judgment given upon the motion as if it were the decree pronounced at the hearing, so as finally to decide the cause.

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Sir E. Sugden and *Mr. Ching*, for the plaintiff. * * *

Mr. Knight and *Mr. K. Parker*, for the defendant, *Mrs. Hall* :

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* * The limitation is to the wife, in opposition and contradiction to the previous limitation to the husband. The subject-matter of the gift is, by express words, taken from him upon the happening of a certain event; and in words equally express, a portion of it is thereupon directed to be paid and applied to the wife during the continuance of the coverture; and at the husband's decease her allowance is to be reduced from 100*l.* to 80*l.* a year. All these circumstances raise an irresistible implication that the testator meant to bestow on *Mrs. Hall*, in the event which he apprehended and therefore provided for, of the son's bankruptcy or insolvency, a separate property in the annuity, which she might employ at her discretion in the support of herself and her husband. Any other construction would be irrational and absurd; for, besides disappointing what was the obvious intention of the donor, it would render the clause of limitation over absolutely null. * * *

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Sir E. Sugden, in reply.

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v.
HALL.
Dec. 14.

[180]

The LORD CHANCELLOR said it was clear that no particular form of words was necessary in order to vest property in a married woman to her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the provisos annexed to the gift; as where, for example, the direction was that the property should be at the wife's own disposal, or that her receipts should be a good discharge; circumstances which raised a manifest implication that the marital right was meant to be excluded. In the present case, however, nothing appeared upon the language or limitations of the will, from which such an inference could be safely drawn, and a receiver must therefore be appointed.

1831.
Jan. 21, 22.

The cause was brought on again, for the purpose of having it determined how far Mrs. Hall was entitled to claim a settlement out of the annuity; a point which had been postponed till the decision of the general question.

Sir E. Sugden and Mr. Ching, for the plaintiff [cited *Elliott v. Cordell*.†]

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Mr. Knight and Mr. K. Parker, *contrà*. * * *

Jan. 24.

THE LORD CHANCELLOR:

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This case involves the question how far a married woman, to whom an annuity for life was bequeathed in terms which have been adjudged not to vest it in her as her separate estate, is entitled to claim a settlement out of it, against one who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And as *Elliott v. Cordell*, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities; and I find no warrant for supposing that *Elliott v. Cordell* introduced any new doctrine upon the subject. The same doctrine, in principle, was recognised long before by Sir W. GRANT, although, undoubtedly, neither in *Mitford v. Mitford*,‡ nor in *Wright v. Morley*,§ was the point raised and disposed of formally. It was, however, repeatedly referred to in

† 21 R. B. 287 (5 Mad. 149).

§ 8 R. B. 69 (11 Ves. 12).

‡ 9 Ves. 87.

those cases; and it is perfectly plain, from the language there used, that the opinion of Sir W. GRANT would have excluded the wife's claim as against particular assignees. If the question were now for the first time raised, whether courts of equity had not gone farther than principle warranted, in allowing the claim against particular assignees, in cases where a capital sum was at stake, some doubt might, perhaps, be entertained; but in a case like *Elliott v. Cordell*, where the question related to a mere life interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the VICE-CHANCELLOR would have gone a great step farther, had he listened to the argument in favour of the wife's equity.—Reg. Lib., B. 1830, f. 917.

[And see the next case.]

TYLER v. LAKE.†

(2 Russ. & Mylne, 183—189; affirming 4 Sim. 144.)

Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim*; and as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use.

By a settlement executed in August, 1825, the Honourable Catharine Tyler, widow, conveyed certain estates to trustees and their heirs, upon trust, immediately after her decease, to sell and dispose of the said estates, and after paying off the incumbrances affecting the same, to stand possessed of the surplus produce of such sale, and of the rents and profits in the meantime, upon further trust, to distribute the residue of the monies to arise therefrom, among all the sons and daughters of the said Catharine Tyler, namely, John Tyler, Catharine, the wife of John Cooke, Betty Maria, the wife of John G. Anthony, Barbara Tyler, William Tyler, Caroline Tyler, Mary Jane Tyler, and Caroline Ann Tyler, if all of them should be then living, in

STANTON
v.
HALL.

1831.
Aug. 13.

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† *Surman v. Wharton*, '91, 1 Q. B. 491, 60 L. J. Q. B. 233, 64 L. T. 866.

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LAKE.

[*184]

equal proportions, share and share alike, but subject to the limitations and declarations thereafter contained concerning the same respectively, (that is to say,) as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, "in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit, in case they should respectively be living at the time of the decease of the said Catharine Tyler, or the time of payment or distribution of the said monies ;" but in case either of them should be then dead, then the share of such of them as should be then dead should be payable to their respective husbands, the said John Cooke and John G. Anthony, if then living, "to and for their own respective use and benefit absolutely," but in case they or either of them the said John Cooke and John G. Anthony should also *have departed this life, leaving lawful issue by their said respective wives, then their respective shares were directed to go over and be paid to and among their children respectively in manner therein mentioned. By subsequent clauses in the settlement, the shares of the four unmarried daughters were directed to be laid out in the funds, or on mortgage, and the dividends and interest to be paid and applied to them or their assigns, "to and for their own proper and respective use and benefit," during their respective lives, with a power of appointment by deed or will. The share of the son, John Tyler, was in like manner directed to be invested, and the interest and dividends to be paid to him "for his own proper use and benefit," with certain remainders over in trust for his children. And lastly the share of the other son, William Tyler, was directed to be held by the trustees upon trust to "pay the same into the proper hands of the said William Tyler, to and for his own use and benefit," in case he should be living at the death of the settlor, but if he should be then dead, his share was to be invested upon certain trusts for the benefit of his wife and family as therein mentioned.

Upon the death of Mrs. Tyler, the settlor, a bill was filed to carry into effect the trusts of the settlement, and under a reference directed by the decree, the Master reported that Betty Maria, the wife of John G. Anthony, was entitled to one eighth

part of the money which should be produced by the sale of the said estates, and to have one eighth part of the intermediate rents and profits paid to her, into her own proper hands, for her own use and benefit. To this report the assignees of John G. Anthony, who had, in the meantime, become a bankrupt, took an exception, on the ground that the bankrupt *was entitled to the said one eighth share of the produce and rents, in right of his wife Betty Maria, and the VICE-CHANCELLOR allowed the exception.

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v.
LAKE,

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Mrs. Anthony appealed from that decision.

Mr. Pepys and Mr. Girdlestone, for Mrs. Anthony. * * *

Sir E. Sugden, Mr. Knight, and Mr. James Campbell, who appeared on the other side, were not called upon to support the decree.

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THE LORD CHANCELLOR :

The decision in *Stanton v. Hall*,† referred to in the Court below, was not come to without grave consideration; and it would stand unimpeached even if the judgment now under appeal were to be reversed. That decision has no application at present, except in as far *as it sanctions the doctrine, that if a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument: to that extent it is an authority for excluding any positive inference which might be drawn from the words here relied on, “as to the shares and proportions of Catharine Cooke and Betty Maria Anthony respectively, in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit.”

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This clause is materially different in its expression, and may be said to be more exclusive than the language of the will in *Stanton v. Hall*. It consists of two parts, the direction to pay the rents and profits into their own proper and respective hands, and the direction that the payment shall be for their own respective use and benefit.

With regard to the latter, I can easily understand the argument

† See the preceding case.

TYLER
v.
LAKE.

that the word "own" may at one time have been held in law to be synonymous with "sole:" but after it has been solemnly decided, as it was by the present MASTER OF THE ROLLS in *Wills v. Sayers*,† and *Roberts v. Spicer*,‡ that that expression standing alone is not sufficient to exclude the marital right, and that in this respect "sole" is a phrase of greater efficacy, I should hold it to be a less sound principle of construction to return to what may have been the old rule, than to adhere to the authority of these modern cases.

Neither do I think that the direction which is superadded, "to pay the shares into their own proper hands," either taken singly or in connection with the rest of the clause, is sufficient to create a separate estate in the wife. [After referring to a number of cases upon this point,§ his Lordship said:] I take the principle, therefore, to be now thoroughly established, that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should be so excluded. * * *

[189] [The VICE-CHANCELLOR's judgment was affirmed.]

WOODMESTON v. WALKER.||

1831.
Feb. 15.

(2 Russ. & Mylne, 197—207; S. C. 9 L. J. Ch. 257.)

Rolls Court.
LEACH, M.R.
On Appeal.
Aug. 12, 15.

A restraint against alienation or anticipation though operative in case of future coverture, may be defeated during any intervening period of discoverture.

Lord
BROUGHAM,
L.C.
[197]

THE testator, Henry Watson, disposed of one third part of his residuary estate in the following manner: "One other full and equal third part thereof I hereby direct to be laid out by my executors in the purchase of a government annuity for the life of my sister Rebecca Woodmeston; which annuity so to be purchased I hereby give and bequeath unto my sister Rebecca, to and for her own sole and separate use and benefit, and independent of any husband she may happen to marry; and

† 4 Madd. 409.

‡ 5 Madd. 491.

§ See the note to *Hartley v. Hurle*,
5 R. R. at p. 118.—O. A. S.

|| Dist. by MALINS, V.-C., *Power*

v. Hayne (1869) L. R. 8 Eq. 262, 266;
Hatton v. May (1876) 3 Ch. D. 148,
153; but see *Day v. Day* (KINDERS-
LEY, V.-C.) 1 Drew. 569, 22 L. J. Ch.
878.

I direct that her receipt or receipts, notwithstanding her coverture, shall be good and sufficient discharge and discharges for the same, and to be for her personal benefit and maintenance, and without power for her to assign or sell the same by way of anticipation or otherwise."

WOOD-
MESTON
v.
WALKER.

Rebecca Woodmeston was a widow at the date of the will, and had continued so ever since; and she filed the present bill, praying to have it declared that she was entitled absolutely to the one third part of the testator's residuary estate.

[The MASTER OF THE ROLLS dismissed the bill.]

The plaintiff, Mrs. Woodmeston, appealed from His Honor's decree, dismissing the bill.

Aug. 12.

[200]

Sir E. Sugden and Mr. Bacon, for the plaintiff. * * *

Mr. Pepys and Mr. Kindersley, for the executors.

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THE LORD CHANCELLOR :

Aug. 15.

[204]

The question in this case is, whether a prohibition against anticipation, annexed to a provision bequeathed to a woman for her separate use, notwithstanding any coverture, and she being at the time and still continuing unmarried,—whether that prohibition so modifies the nature of the property bequeathed, as to render the interest which she takes incapable of being aliened.

The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the interest given, is precisely the same, I apprehend, in personal as in real estate. Thus, where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it, as to create in the donee a life-estate which he may not alien: although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done; for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual. If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the

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MESTON
v.
WALKER.

interest of the legatee, and create a new interest in another. In none of the cases bearing upon this subject (and they are very numerous) can any warrant be found for the proposition, that at law an inalienable estate can be created without any gift over. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture.

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In this Court it has been held, that where property is given to a married woman to her sole and separate use, alienation may be prohibited in respect of the property so settled, without annexing any limitation over, to operate by way of defeasance of the first estate; and the ground on which that has been supported by Lord ELDON and Lord THURLOW appears to be clearly consistent with itself and with legal principle, but to have no application to the present case.

Baron and feme being one person in law, no separate estate could at law be enjoyed by the wife against the husband, so as not to be liable to his engagements or control. Nor was it till after a considerable struggle (as appears from the language of Lord COWPER in *Harvey v. Harvey*†), that courts of equity ventured to introduce a different doctrine, and to hold that personal chattels might be so given to a married woman as to vest in her alone, to the entire exclusion of her husband. That doctrine, however, has now been long established, insomuch that it has in later times become a regular mode of settling property on a *feme covert*, convey it by such a form of words as shall expressly exclude the marital right, and place her, in respect of that property, exactly in the condition of a *feme sole*.

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As the separate estate of the wife was thus the invention of equity, it followed, that the same Court which invented, might mould and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which in the case of a *feme covert* equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner. And it is strictly in accordance with the same *principle that equity allows such restrictions to be imposed on the separate interest thus given, as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or

† 1 P. Wms. 125.

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MESTON
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testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit. It was upon this ground that a proviso prohibiting the wife from aliening her separate estate, or a clause against anticipation, as it has been called, was first introduced in Miss Watson's settlement: upon this ground the validity of such a proviso has been recognized by Lord THURLOW,[†] and subsequently upheld by Lord ELDON in *Jones v. Harris*[‡] and various later cases; and it is now perfectly well established that, with respect to personal estate settled to the separate use of a married woman, a clause against anticipation will be effectual so long as the coverture continues. No authority, however, can be found for the position, that a *feme sole* may be tied up and restricted in the dominion over her property, any more than a male, who is clearly incapable of being so restricted. The operation of the clause against anticipation, where there is no limitation over, rests entirely on its connection with the coverture, and on its being applied to a species of interest which is itself the creature of equity. The present is not a case where there is a coverture, but a possibility only of coverture; and it would be going farther than the authorities warrant, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest conveyed to the separate use of a *feme sole* (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply *because at some after period she might possibly contract a marriage.

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It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures. § But

[†] See *Pybus v. Smith*, 3 Br. C. C. 340.

[‡] 7 R. R. 282 (9 Ves. 486).

§ See now *Tullett v. Armstrong*

(1840) 4 My. & Cr. 377, 405, establishing this "strange and anomalous species of estate."—O. A. S.

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it is unnecessary to consider that question, as no such contrivance has been resorted to in this case. Here the bequest is merely coupled with a naked prohibition against alienation by the legatee. The decision in *Barton v. Briscoe*,† where there had been a coverture, which was determined, proceeds strictly upon the principle adverted to; and upon the authority of that case, as well as the general principle and reason of the thing, I have no hesitation in stating that my opinion differs from that of the MASTER OF THE ROLLS; and I must therefore hold that the plaintiff takes, at her election, an absolute interest either in the one third share of the testator's residuary estate, or in the annuity to be purchased with that share.

1815.
May 25.

Rolls Court.
GRANT, M.R.
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JONES v. SALTER.‡

(2 Russ. & Mylne, 208, 209.)

Bequest of dividends of stock to a *feme covert* for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof: Held, that the legatee, on becoming discoverd might validly dispose of her entire life-interest.

MARY BAKER, by her will dated 14th of January, 1802, gave to the defendant, her executor, 2,000*l.* 4 per cents., in trust, as to 1,000*l.*, to permit the plaintiff, Joshua Jones (since deceased), to receive the dividends for his life, and after his decease, in case the plaintiff Ann Jones his wife should survive him, in trust that she should receive the dividends for her separate use for her life; and as to the other 1,000*l.*, upon trust to pay to or authorize the plaintiff Ann Jones to receive the dividends thereof for her life, for her separate use; “and that the same, as well as the interest, dividends, and produce of the said 1,000*l.* 4 per cent. Bank Annuities, so bequeathed in the event of her surviving the said Joshua Jones her husband, should not be subject to the debts, dues or demands, and be free from the control or interference

† Jac. 603, where the restraint on anticipation was confined by the terms of the settlement to the coverture here referred to.—O. A. S.

‡ The reporter is indebted to the kindness of *Mr. Treslove* for the note

of this case, in which the point principally considered in the preceding case of *Woodmeston v. Walker*, was determined in the same way by Sir W. GRANT.

of the said Joshua Jones, or of any other husband or husbands with whom she might at any time thereafter intermarry, and without any power to charge, incumber, anticipate, or assign the growing payments thereof." And the testatrix directed that the receipts of the plaintiff Ann Jones alone for the dividends should be a sufficient discharge: and after her death, in case the said Joshua Jones should survive her, upon trust to permit him to receive the dividends for his life, and after the death of the plaintiffs Joshua Jones and Ann Jones, upon trust to *divide the said sums of 1,000*l.* and 1,000*l.* 4 per cent. Bank Annuities among their four sons.

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After the death of Joshua Jones the husband, this petition was presented by the plaintiff Ann Jones, and the eldest son, who had attained twenty-one, stating that it would be of great benefit to the son to receive his fourth part of the 2,000*l.* Bank Annuities, and that his mother the petitioner Ann Jones, was desirous of assisting him by giving up her life interest in the fourth part, and therefore praying a transfer of one fourth part of the said Bank Annuities; and Sir WILLIAM GRANT, then Master of the Rolls, after some consideration, made an order accordingly.

Some time afterwards a similar petition was presented by the mother and the second son, on his attaining twenty-one, for the like purpose, when a similar order was again obtained from the same Judge.

Mr. Treslove, for the petitioners.

AMPHLETT v. PARKE.†

(2 Russ. & Mylne, 221—237; S. C. 9 L. J. Ch. 161; reversing 1 Sim. 275; 4 Russ. 75; 5 L. J. Ch. 139.)

A testatrix gave her real estates upon trust to be sold, and directed the monies to arise from the sale to be considered and taken as part of her personal estate; she then willed, that out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the monies arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees

1831.
Jan.

SHADWELL,
V.-C.

On Appeal.
Feb. 11.

Lord
BROUGHAM,
L.C.

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† *Singleton v. Tomlinson* (1878) 3 App. Cas. 404, 38 L. T. 653.

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having died in the testatrix's lifetime; it was held (reversing the decision of the Court below), that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir-at-law.

MARTHA CLAY by her will, executed and attested so as to pass freehold estates, disposed of her property as follows: "I give and devise all my freehold and copyhold estates, in the county of Essex, unto and to the use of Nicholas Martyn, Esq., and Rawson Parke, Esq., their heirs and assigns, upon trust to sell the same either by public auction or private contract; and I will and direct that the monies to arise from such sale be considered and taken to be part of my personal estate." After directing that the receipts of her trustees should be sufficient discharges to purchasers, the testatrix proceeded as follows: "And I do hereby will and direct, that out of the monies to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned be paid and satisfied; (that is to say)" &c. The testatrix then gave a number of pecuniary legacies to different persons by name; and among the rest, one of 1,000*l.* to Elizabeth Parke, and another of the like amount to Lydia Amphlett. She then continued in these words: "And all the residue of my personal estate, and of the monies arising from the sale of my real estates, I give and bequeath to the before named Nicholas Martyn, his executors, administrators, and assigns, upon trust to pay the interest thereof to the before named Elizabeth Parke for her life, for her separate use, and after

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her death, upon trust to pay and divide the capital *to, between, and amongst all and every the child and children of the said Elizabeth Parke, born and to be born, equally share and share alike; the respective shares of the sons to be paid at twenty-one, and of the daughters at twenty-one, or marriage, which shall first happen, with benefit of survivorship between them, in the event of the death of one or more of them before such age or time as aforesaid, not only as to their respective original shares, but likewise as to all such share or shares as shall accrue to them respectively by survivorship; and if there shall be but one such child, then to such only child at such age or time as

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aforesaid; but in case there shall not be any child who, being a son, shall live to attain the age of twenty-one, or being a daughter, shall live to attain the age of twenty-one; or marry, then upon trust to pay the interest thereof to the before named Lydia Amphlett for her life, for her separate use, and after her death, upon trust for all and every her child and children born and to be born, in such manner and with such benefit of survivorship as I have herein-before directed concerning the child and children of the said Elizabeth Parke; and in case neither the said Elizabeth Parke or the said Lydia Amphlett shall have any child who shall live to attain such age or time as aforesaid, then upon trust, as to one moiety, for the executors or administrators of the said Elizabeth Parke, and as to the other moiety, to the executors or administrators of the said Lydia Amphlett. And I appoint the said Nicholas Martyn and Rawson Parke executors."

The value of the legacies greatly exceeded the amount of the personal estate; and several of the legatees having died in the lifetime of the testatrix, the question in the cause was, whether the words of the will operated as an absolute conversion of the real estate into personalty, so that legacies given out of the produce of that estate, and having lapsed, fell into the residue, for the benefit of the *residuary legatees, or whether the conversion was partial only, so that those legacies reverted to the heir.

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The decree of the Vice-Chancellor, Sir JOHN LEACH, declared, that the legacies which lapsed by the death of the legatees in the lifetime of the testatrix, sunk into and formed part of the personal estate, and that her heir-at-law was not entitled to any part thereof.†

His Honour, having afterwards heard a second argument on the minutes, at the Rolls, adhered to the judgment he originally pronounced in favour of the residuary legatees:‡ and the heir-at-law appealed from his decision.

The question was again elaborately argued on the appeal by Sir E. Sugden and Mr. Rolfe, for the heir-at-law, and by the

† 1 Sim. 275.

‡ 4 Russ. 75.

AMPHLETT *Solicitor-General* and *Mr. Boteler*, for the residuary legatees.
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 PARKE. The cases relied upon in the arguments are all referred to in the
 LORD CHANCELLOR's judgment.

Feb. 11. THE LORD CHANCELLOR:

This case was argued before me at great length; a circumstance which I am far from regretting, because it involves a question of very great importance in point of law, with reference to the rights of the heir-at-law as contrasted with those of residuary legatees, and with reference to a series of decisions, apparently broken in upon by one or two cases, which in the Court below have been made the foundation of the judgment now under appeal. Upon looking at the judgment of the *MASTER OF THE ROLLS, I find that his Honor felt considerable reluctance in deciding against the heir; and there is every reason to believe that, if he had closely examined the cases by which he held himself bound, those of *Mallabar v. Mallabar*,† and *Durour v. Motteux*,‡ which I have had an opportunity of consulting,—the one in Mr. Coxe's valuable MSS. in Lincoln's Inn Library, the other in the original manuscript of Lord Hardwicke himself, from the collection at Wimpole,—he would have found the doubts confirmed which have been entertained by the profession respecting the accuracy of those cases as reported in the books; and I feel persuaded, that if his Honor had been possessed of the same materials, he would have come to the same conclusion at which I have arrived, and which, from the course of his observations, his Honor appears desirous to have reached. I have endeavoured to satisfy myself that we are not bound by those cases, when they are rightly considered and understood; and those cases alone prevented his Honor from coming to that conclusion.

This is a question arising upon a competition, as it were, between the heir-at-law and the residuary legatee, with respect to certain lapsed legacies. There is, first, a devise of all the real and personal estate to be sold; and all the monies arising from such sale are to be considered and taken as part of the personal estate. These, generally speaking, are strong words.

† Ca. t. Talb. 78.

‡ 1 Ves. Sen. 320. See 12 R. R. 253, n.

The testatrix then goes on: "And I do hereby will and direct, that out of the monies to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned shall be paid:" again considering the produce of the sale and the personal estate to be confounded *in one common mass of personalty. After the general clauses of devise in trust for the payment of the legacies, we come to what must be considered, in a question like the present, to be the operative part of the will; and this, as it is that on which the residuary legatee rests his claim, requires to be accurately weighed and sifted; for it signifies little what a testator may have said in the introductory clauses, if he does not clearly maintain the same view when he comes to that part of the will which relates to the residue; that being, in effect, the title-deed under which alone the residuary legatee takes, if he can take at all. And see how important the frame of this clause is, and how remarkably the testatrix has here varied her language: "And all the residue of my personal estate;"—not stopping there, for if she had, it might have been contended that she meant to include under the phrase the monies to be produced by the sales, the fruits of which she had said were to be so considered and taken, but—"All the residue of my personal estate, and of the monies arising from the sale of my real estates." Now, monies arising from the sale of real estates are here spoken of as something not identical, but rather put in contrast with the residue of the personal estate; a most material circumstance, which pressed much upon his Honor, and one which, but for the authorities of *Mallabar v. Mallabar*, and *Durour v. Motteux*, would evidently have led him to decide in favour of the heir.

Before going further, I have to observe, with reference to the strong words, directing the sale and conversion of the lands into money, and the produce to be considered as part of the personal estate, that to be sure it is to be so considered; and in the sense which I give to the whole will, that produce is so considered; not, however, absolutely, not to all intents and purposes, but, as it were, **secundum quid*, relatively only, and severally, according to the subject-matter; part of it to go in exoneration of the incumbrances on the real estate, part in payment of the debts

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and legacies, and the remaining part to enure, by way of resulting trust, for the heir, as I think I shall shew the rule of law to be, unless where the realty, or any part of it, has been clearly and completely taken from him.

When I say that the mere circumstance of directing that the produce of the sales shall be deemed personal estate, is not of itself sufficient to divest the heir, I am not without the authority of decided cases. In the *Countess of Bristol v. Hungerford*,[†] there was a devise of real estate to executors, to be sold for payment of debts, the surplus, if any, to be deemed personal estate, —the very words here. Nevertheless, the Lord Keeper, on general principles, decreed the surplus to be a trust for the heirs-at-law; and the decision was affirmed in the House of Lords. It is true the appeal was rather as to another part of the case; but the circumstance of the appeal gives some security for the correctness of Mr. Vernon's report on this point, although his general accuracy as a reporter is not always to be relied on.‡

[*227] These words, then, are not sufficient to exclude the general rule of law; and the question, therefore, comes to be, whether there is or is not a complete disposition, an entire conversion, out and out, of the whole into personal estate, to all intents and purposes, or only so far forth as may be necessary to satisfy the purposes of the *bequests in the will. That is the single question. The rule is exceedingly well stated in a very learned and useful note to the report of *Cruse v. Barley*.§ In that note Mr. Cox extracts the sound principle to be collected from all the cases, namely, that where the testator gives to the produce of real estate the quality of personalty, to all intents, and that clearly appears from the whole will, the residuary as well as the introductory clauses, there the residuary legatee shall take; but that, if he has not so done, if he has only directed the conversion for the particular purposes mentioned in the will, then, although the residue is specifically bequeathed, the rule is otherwise. The residuary legatee, by force of the term, is to take all that is residue; but to say that he takes this (the produce of real estate,

[†] 2 Vern. 645.

Vernon's report of this case is incorrect.

[‡] See 3 P. Wms. 194, note C.,
from which it appears that Mr.

§ 3 P. Wms. 20.

in the event not otherwise disposed of) *qua* residue, is only to beg the question. I deny that it is residue here.

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The general principle appears to be, that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but that there must appear a clear, substantive, and undeniable intent on the part of the devisor or testator to exclude him; otherwise neither can the next of kin, as being entitled under the Statute of Distributions, take from the executor, nor can residuary legatees, whether they be the executors or specific legatees of the residue, take more than that which is in its nature residue, to the prejudice of the claims of the heir-at-law. And the executors will hold, as a resulting trust, whatever would have gone to the heir-at-law if he had not been excluded, the proof lying on the residuary legatee to displace the heir and substitute himself. Accordingly, all these cases turn, as they naturally must, upon what the particular will has done; *and to say that any positive rule of construction is laid down in *Mallabar v. Mallabar*, and *Durour v. Motteux*, is to speak without sufficiently considering, first, the subject-matter of the supposed rule, as extracted by Mr. Cox; and, next, the general rule of law. For the inquiry upon these rules always is,—has the heir-at-law, in each individual case, been sufficiently removed to let in the residuary legatee to that, which, whether it continues to be land, or whether it has been converted for a specific purpose into money, is only money till the purpose is answered or fails, and which, in the latter case, as a resulting trust, will then revert to the heir-at-law?

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The first material case referred to upon this subject is *Cruse v. Barley*,† which certainly furnishes no authority for contending that that doctrine has ever ceased to be law in this Court. That was a very strong instance of conversion, of dealing with the proceeds of the sale of the real estate, and confounding, as some of the cases term it, the realty and personalty together, putting them into one common fund: it is quite as strong as *Mallabar v. Mallabar*, and it was determined on great consideration. It was a devise of land to be sold, and also of personalty, and the money arising from the sale of real estate was to be divided amongst

† 3 P. Wms. 20.

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the testator's children, with 200*l.* to the heir-at-law at twenty-one, and "all the rest and residue thereof (that is, of the testator's personal and the produce of his real estate), among the other children when they attained the age of twenty-one years, with the benefit of survivorship among them." The case was fully argued, and very much considered; precedents were searched for, and time was taken to deliberate; and the MASTER OF THE ROLLS was of opinion, *on the general principles of law, that the heir took, notwithstanding the conversion, after the purposes of the will had been accomplished, or in the event of any of those purposes failing.

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I say nothing of *Maugham v. Mason*,† which goes precisely on the same principle as *Collins v. Wakeman*,‡ and *Chitty v. Parker*,§ where the next of kin and the heir-at-law were the only litigating parties in the field.|| This is not a contest between next of kin and an heir-at-law; and it is not pretended, that if there is no specific donee, the heir-at-law can ever be defeated by the next of kin. That is perfectly clear. Those cases, therefore, have no application. Besides the cases of *Cruse v. Barley* and *Digby v. Legard*,¶ another authority, to which, upon the argument in the Court below, the attention of his Honor was not called, and which is entitled to the greatest possible respect, is *Gibbs v. Rumsey*,†† before Sir William Grant. The words there were nearly the same as those which occur in *Green v. Jackson*,‡‡ of which I shall say a word hereafter. "Such part of the real estate," says Sir WILLIAM GRANT in *Gibbs v. Rumsey*, "as is given to charitable purposes (and which is void under the Statute of Mortmain) belongs to the heir-at-law, and does not go either to the next of kin, or the residuary legatee."

The question, then, comes to be, with respect to those two excepted cases of *Mallabar v. Mallabar*§§ and *Durour v. Motteux*,|| by which his Honor the MASTER OF THE ROLLS appears to have thought himself bound. Upon *looking into *Mallabar v. Mallabar*, I find that one great argument, which was urged on both sides,

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† 12 R. R. 251 (1 V. & B. 410).

‡ 2 Ves. J. 683.

§ 2 Ves. J. 271.

|| For which reason the reports of those two cases were not retained in the Revised Reports.—O. A. S.

¶ 3 P. Wms. 22, Cox's note, 2 Dick. 500.

†† 13 R. R. 88 (2 V. & B. 294).

‡‡ See next case.

§§ Ca. t. Talb. 78.

||| 1 Ves. sen. 320.

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and to which the attention of the Court appears to have been principally directed, was a pretension of a monstrous nature, viz., that to discover what was the legal meaning of certain phrases in that will, parol evidence was to be let in, evidence of the intention of the testator, as stated by him in conversations with the witnesses in whose presence he made his will. Lord TALBOT, it is to be observed, admitted that evidence. In Forrester's report his Lordship is made to say, "If this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence; but as it has been done, and particularly in the case of *Doxey v. Doxey* and *Littlebury v. Buckley*,† I now admit it to be done." Then was read a deposition of a witness, who gave full evidence of the testator's declaration that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate. How this could ever be admissible evidence it appears impossible to discover, but it may have influenced the decision of the learned Judge; although the reporter adds, "The LORD CHANCELLOR decreed upon the will itself, independently of the parol evidence, that here was no resulting trust for the heir, and that the executrix should have the whole residue, after the sale of the estate, both of the money arising by such sale and of the personal estate." I have looked into Mr. Coxe's notes in Lincoln's Inn Library, where I find a much more full and accurate account of that case; and it turns out that there was a very material circumstance, which was shortly alluded to at the Bar, and which is not to be lost sight of,—there was a legacy of 500*l.* expressly given *out of the fund to the heir-at-law.‡ That legacy, *Mr. Fazakerly* argued, was a most important bequest, as raising an implied presumption against the heir, especially when coupled with the fact of the testator's leaving to his sister scarcely any thing but a burthen, unless, upon the general scope and effect of the will, she was to take beneficially in her character of residuary legatee; and he relied on the way in which the particulars of the property, the lands, the houses, the tithes, the rent-charges, and the various provisions respecting them, were minutely recited and detailed,

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† Cited 2 Vern. 677.

‡ This legacy is mentioned in Mr. Forrester's report.

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as proving that the testator, at the time, had the whole of his property in his eye. All these different particulars the testator carefully enumerates; he directs them to be converted into personalty, and put into one fund, and out of that fund the legacy to be paid to the heir; and he then goes on to mention his sister, the residuary legatee, as the special object of his bounty. Taking all these circumstances together, the Court may very possibly have held that there was enough, on the face of the instrument, to establish a clear intention to displace the heir-at-law; for Lord TALBOT says, "The testator intended that the whole of the real estate should be turned into money; and the question was, whether the monies arising from the estate sold should go to the heir-at-law." He then observes on the fact of the 500*l.* legacy, and adopts *Mr. Fazakerly's* argument to its fullest extent, making it, in a great measure, the ground of his decision. That gives a very great specialty to the case; and though I am not to reconcile it with *Cruse v. Barley*, there is still enough to differ it from that case, with which, possibly, it may stand, and enough to shew it was decided on the apparent intention to displace the heir, in accordance with the rule which

[*232] I have stated to *be extracted from all the cases, that you must clearly prove that the heir-at-law is excluded; that the words prevent the possibility of considering any thing to be left as a resulting trust for him; and that the burthen of such proof lies upon those who claim in opposition to him.

It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause; if he says, for instance, "I give all the lapsed legacies as parcel of my residue to the residuary legatee," *cadit questio*, there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention, to be gathered from the whole instrument.

If you once arrive at the conclusion that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention: and so I take to have been the feeling of Lord HARDWICKE, from what I see of his judgment in the case of *Durour v. Motteux*. On comparing the statement of the will in that case as set out in Messrs. Simons and Stuart's Reports,† with the very incorrect and slovenly note of it in Vesey, it is perfectly clear that the will was so framed as to make that an exceedingly probable intention; as Lord HARDWICKE at once perceived. The testator enumerates very *minutely his whole

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† A short note of the will taken from the Registrar's book has already been given in a note to *Maugham v. Mason*, 12 R. B. 253, n. (1 V. & B. 413, n.). The more complete statement, given in a note to 1 S. & S. 292, n., is as follows:

*Reg. Lib. 1749, A. fol. 253.

Timothy Motteux, by his will, gave all his estate, consisting in a freehold and some leasehold, monies, securities, bonds, stocks, debts, both at home and abroad, goods in trade, both at home and abroad, household goods, plate, jewels, linen, *wearing apparel, and all he had, or might have, or claim to, of what kind soever, or wheresoever, upon trust to sell and dispose of all his freeholds, leaseholds, monies, securities, bonds, stocks, debts, both at home and abroad, goods in trade, both at home and abroad, household goods, plate, jewels, linen, wearing apparel, and all he had, or might have, or claim to, of what kind soever or wheresoever, and after payment of all his debts, funeral expenses and legacies, to put or place out all the residue of his personal estate at interest, upon Government or other securities, in the names of his trustees, upon trust that they should pay and apply the interest and produce arising thereby between the persons thereafter mentioned, during their joint lives;

and, after the death of either of them, then to pay to the survivors also during their joint lives; and, after their death, then to pay the whole produce to the last survivor for life: and then to pay and apply the said residue and the principal, unto and amongst the respective children, lawfully begotten, of those he had thereafter mentioned, to be entitled to a share of the interest or produce of the overplus, to be equally divided. The testator then gave several legacies, some to individuals, and others for charitable purposes, and amongst them the legacy of 12,000*l.* mentioned in the report; and the remainder of his estate and the interest thereon, being placed out at interest in some of the funds, the yearly interest, be it what it would, the testator ordered to be paid quarterly to and amongst the following persons, if alive, share and share alike; (if any should sell or transfer their right to it, then, in such case, that person or their representative to be cut off and go amongst the rest,)—to the plaintiff P. Motteux, jun. one full quarter part; to the plaintiff Stephen Hubert, one full quarter part; to the defendant Susannah Jarvis, one full quarter part, and to the defendant Magdalen Foulle, one full quarter part; to these two last to be paid into their own hands, on their own receipts, so that their husbands might have no

[*1 S. & S.
292, n.]

[*293, n.]

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property, leaseholds, freeholds, money, securities, bonds, stock both at home and abroad, plate and linen, and all he had or might have any claim to, of what kind soever, and so forth, and directs that the residue, being personalty, should be invested in Government or other securities in the names of his trustees, on trust, and that the whole produce, be it what it may, should go to the last survivor for life (for he gave it out in life interests only); and to pay the residue and the principal unto and among the respective children and so forth; and the remainder of his estate being placed out at interest in some of the funds, then he directs it to be dealt with in like manner. Now, undoubtedly, from this it might be more easy to collect the intention, than from the short note in Vesey, and to contend it was the express design of the testator to give the whole, whatever it might amount to, and whether consisting of such parts of his property as were previously undisposed of, or of surplus produced by the sale of real estate, as to which his purpose failed in consequence of mortmain or otherwise, to those persons who are the particular objects of his bounty.

On looking further into the case, however, you will find that this, though the only point in the cause which bears upon the present question, was not much discussed at the Bar, and certainly not much considered by the Judge. The great contention there was, whether a certain gift, said to be mortmain, was mortmain or not. The argument turned mainly upon that; and although Lord Hardwicke's manuscript book, now lying before me, contains an entry making some reference to the conflicting claims of the heir-at-law and residuary legatee, and gives the substance of the argument of counsel, yet when his Lordship comes to deliver his own judgment, he directs it entirely to the question of mortmain, *as if that were almost

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right to it; and, after the decease of the longest liver of the said four, or of those that should not have alienated their claim, he desired that the principal of the residue of his estate should be divided and go to and amongst the children gotten, or to be begotten, by the said plaintiffs P. Motteux,

jun. and Stephen Hubert, and the defendants Susannah Jarvis and Magdalen Foulle, as was before explained; and he appointed the plaintiffs Francis Motteux, James Daniel Hubert, Stephen Hubert, and P. Motteux, jun. executors of his will.

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the only subject to which his attention was particularly called. So that it happens here, as it often happens in cases of importance, that where one point in a cause is of main consideration, and another comes in only by the by, after the former has engrossed the attention of the Court, it is at once assumed, and slurred over and disposed of hastily. The question of mortmain appears to have been argued with great learning, and was strongly present to his Lordship's mind; and, indeed, all he says respecting the other point is, "I hold the bequest of 1,200*l.* to be, under the Mortmain Act, void," and then he states one or two grounds on which he so held it, "and, therefore," he concludes, "it shall fall into the residue of the testator's estate, and be divided according to his will." Now really I do not at all deny that: I agree that it falls into the residue of the testator's estate, and should be divided according to his will. This would leave it quite in doubt whether Lord HARDWICKE meant the heir-at-law to take the residue: but on examining the registrar's book, it appears that the decree was drawn up as if the residuary legatee, and not the heir, took it. The report in Vesey† cannot be correct. Lord HARDWICKE is there represented as saying that the cases on the subject differed, but the last determination he believed was in favour of the heir-at-law. Now that is not the way in which a learned and accomplished lawyer like Lord HARDWICKE would have treated so grave a question; it is precisely the way in which an unlettered and ignorant man would have spoken. Lord HARDWICKE knew well that it was in *Arnold v. Chapman*; he had previously decided in favour of the heir; and it is impossible to conceive that his Lordship, who but a year and a half before had determined that case upon *great consideration, and who had then thoroughly discussed the question, and distinctly laid down the legal doctrine, should have decided as he is here represented to have done, if his attention had been sufficiently drawn to the point; least of all, is it conceivable that he should have treated the decision in *Arnold v. Chapman* as a mere chance *dictum*, as if that capriciously gave it to the heir, and now it was the turn of the residuary legatee. In *Arnold v. Chapman* copyhold estate was given to A. on condition that he

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† 1 Ves. sen. 320.

† 1 Ves. sen. 108.

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should pay 1,000*l.* to the executors upon trust for a charity. This his Lordship held clearly to be a shift to evade the Mortmain Act, and therefore not to be allowed. His words are, "The heir-at-law then is entitled by way of resulting trust, because this 1,000*l.* is mentioned by way of condition on the devise of the real estate, and is to be paid to the executors; and to be sure if wanted for debts it would vest, and must be admitted by the executors, for that purpose only, to be turned into personal estate. But the Act has prevented this transmutation for the benefit of the hospital, and then it remains part of the real, undisposed by the will; for the executors take it only as trustees, and any part or profits of the real estate undisposed will be a resulting trust for the heir."

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Last of all comes the case of *Green v. Jackson*,[†] where his Honour decided as he had previously done in the present case, and relied upon the same authorities. In *Green v. Jackson* all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in *the executors for certain purposes: "And I do direct that my said trustees, &c. shall pay and apply all the residue of the monies which shall then be in their hands unto and among all the children," &c. that is, the residuary legatees. His Honor held there, on the peculiar language of the instrument and the authority of *Dorour v. Motteux*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise, all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it, among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteux*.

A good deal was said of *Ackroyd v. Smithson*,[‡] chiefly on account of Lord ELDON's most able argument in that case: but the case has, in fact, no application; for the contest there lay, not as here, between the heir and residuary legatees, as might at first

[†] See next case.

[‡] 1 Br. C. C. 503.

be supposed, but between the heir and the next of kin, each claiming, as undisposed of, a lapsed share of residue, the produce of real estates directed to be sold. As to that there can be no doubt; for it is admitted on all hands, that unless the next of kin is made a specific donee he never can stand in competition with the heir-at-law. With respect to the case of *Kennell v. Abbott*,† before Lord ALVANLEY, a Judge whose deservedly high authority pressed me very strongly, I can only say that he appears there to have proceeded on the common understanding of *Durour v. Motteux*, a case which, from the circumstances already mentioned, seems to have been generally misconceived.

In reversing the judgment of the MASTER OF THE ROLLS, it is a great satisfaction to me to find that his Honour plainly intimated his own opinion to be against the decision to which, on the authority of the cases, he thought himself bound to come. I have endeavoured to shew that the effect of those cases has not been correctly understood, and that they are not binding upon the Court; but it is so anxious and alarming a matter to be called upon to depart from what a Judge like Lord ALVANLEY seems to have considered as settled by authority, that I have deemed it necessary to state my reasons at large, which must be my apology for having taken up so much of the public time.

A petition of appeal was presented to the House of Lords against this decision; but the appeal was compromised before it came to a hearing, the heir and the residuary legatee dividing the fund between them.

GREEN v. JACKSON.

(2 Russ. & Mylne, 238—246; affirming 5 Russ. 35.)

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B., the failure of the charitable legacies was held to enure to the benefit of A. and B.

THE will of Joseph Chapman, upon which the question in the cause arose, is stated by Mr. Russell in his report of the case upon the hearing at the Rolls [as follows:]

† 4 R. R. 351 (4 Ves. 802).

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PARKER.

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1828.
July 23.

Rolls Court.
LEACH, M.R.

On Appeal.
1831.

April 27.

Lord
BROUGHAM,
L.C.

1835.

Jan. 15.

April 1.

Lord
LYNDHURST,
L.C.

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v.
JACKSON.
[5 Russ. 35]

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Joseph Chapman by his will, dated the 7th of February, 1816, after bequeathing to his wife a sum of 200*l.* and certain specific articles, gave all his personal estate and effects to Thomas Jackson, George Greenwood, Thomas Hugall, and John Hudson, their executors or administrators, upon trust to pay some legacies. There followed specific devises of parts of his real estate, intermingled with bequests of sums of money; after which the testator devised certain tenements, particularly described, "and all other my real estate whatsoever, and wheresoever situate, not hereinbefore specifically devised as aforesaid, unto my said trustees Thomas Jackson, George Greenwood, Thomas Hugall, and John Hudson, their heirs and assigns, upon trust that they my said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, shall and do, as soon as conveniently may be after my decease, sell and dispose of all such my said last-mentioned real estates for the best price or prices that can be reasonably had or gotten for the same; and it is my will and mind that all the monies to be received by my said trustees by sale of all my said above-mentioned real estates, and by virtue of the bequests of my said personalty, and all other my monies which may come to their hands, after my debts and legacies, and the two several sums directed to be sunk by way of annuity, and all costs, charges, and expenses attending the execution of this my will, are paid, satisfied, and provided for, shall be by them my said trustees placed in one of the banking-houses in Hull, till the whole can be collected and got in, except the 4,000*l.* part of my personalty, arising from *Messrs. Brooke and Pease and Mr. Richard Thompson's mortgages, and also except the 2,000*l.* of which my wife is also to receive the interest during her life or widowhood, and which two sums are to be applied by my trustees, on the death or marriage again of my said wife; and after the amount of such money is ascertained, and the same lodged at interest in one of the banking-houses in Hull, as above mentioned, I direct that my said trustees, or the survivors or survivor of them, or the executor or administrator of such survivor, shall or do, on the death or marriage again of my said wife, but not before one of those events shall have taken place, put into the hands of the vicar, &c.;" and then came directions to pay considerable

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sums for particular charitable purposes. "And I do direct," continued the testator, "that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and do, on the death or marriage again of my said wife, but not before one of those events shall have taken place, pay and apply all the residue of the monies which shall then be in their hands, after full satisfaction and discharge of the aforesaid several payments and bequests as above mentioned, unto and among all and every the children who shall be then living of my said half-nephews Thomas Chapman, William Chapman, Philip Chapman, and Thomas Sutton, my said late half-nephews Samuel Chapman and John Chapman, and my said half-nieces Eleanor Chapman, Mary Wells, Ann Owton, Susannah Simpson, Ann Briggs, Margaret Fields, Ann Gray, Eleanor Ash, in equal shares, to be paid at their respective ages of twenty-one years, with interest in the meantime towards their support."

The bill was filed by the next of kin of the testator, one of whom was also his heir-at-law.

It was admitted that the charitable legacies failed in the proportion which the produce of the real estate bore to the produce of the personal estate; and the question in the cause was, whether that failure enured to the benefit of the heir-at-law, or of the next of kin, or of the persons described in the residuary gift.

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The MASTER OF THE ROLLS having decided that the failure of the charitable legacies given by the will enured to the benefit of the persons described in the residuary gift, the heir-at-law and some of the next of kin of the testator joined in presenting a petition of appeal against his Honor's decision.

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[2 R. & M.
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This petition came on to be heard before Lord Chancellor Brougham in April, 1831, when the appeal was fully argued, by *Mr. Agar*, *Mr. Preston*, and *Mr. Duckworth*, on behalf of the heir-at-law; by *Mr. Lynch*, on behalf of the next of kin; and by the *Solicitor-General*, (Sir W. Horne) and *Sir Edward Sugden*, on behalf of the residuary legatees. In the course of the discussion considerable reference was made to the decision of

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his Lordship in the recent case of *Amphlett v. Parke*,† which, while it was strenuously represented on the one side, and as strenuously denied on the other, to have a direct and conclusive bearing on the question before the Court, was stated to be likely in the course of a very short period to be brought under the review of the House of *Lords, in conformity with his Lordship's suggestion. When the counsel for the respondents had concluded their argument, the LORD CHANCELLOR said that, having regard to his decision in *Amphlett v. Parke*, and to the peculiar situation in which that case stood, he was disposed to postpone his decision in *Green v. Jackson* until the judgment of the House of Lords upon the pending appeal in *Amphlett v. Parke* should be pronounced.

Circumstances subsequently occurred which induced the parties in the cause of *Amphlett v. Parke* to come to a compromise of their conflicting claims; the appeal to the House of Lords in that case was abandoned;‡ and Lord Brougham having resigned the Great Seal before any arrangement could be made for having the appeal in *Green v. Jackson* reheard and finally disposed of, that appeal was now set down, upon a special application, to be re-argued before his successor, Lord Lyndhurst.

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Mr. Agar, Mr. Preston, and Mr. Duckworth, for the appeal. * * *

Sir W. Horne and Mr. Rudall, for the residuary legatees. * * *

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Mr. Hovenden and Mr. J. Russell, appeared for other parties.

April 1.

THE LORD CHANCELLOR :§

This was an appeal from the judgment of the late MASTER OF THE ROLLS. Joseph Chapman being possessed of considerable property, both real and personal, by his will directed that his real and personal property should be sold and converted into money, and that the produce should be lodged at interest in one of the banking houses at Hull. He directed certain legacies to

† *Ante*, p. 61.

‡ See *ante*, p. 75.

§ Lord Lyndhurst.

be paid, and, among others, some for charitable purposes, which, as far as they were payable out of real estate, are admitted to be void. The question is, whether that part of the testator's property fell into the residue, or belongs to the heir-at-law.

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The testator, in two several parts of his will, speaking of the mixed fund, calls it the residue of his personalty. He directs his property to be converted into money, which is not to be applied to the ultimate object of the trust until the death of his wife; but is, in the meantime, to remain at interest in the hands of a banker at Hull. Having upon two occasions called the mixed fund "the residue of his personalty," he directs his executors, upon the death of his wife, to pay and apply the residue of the monies which should be in their hands after satisfying the previous dispositions contained in his will, unto and among the persons whom he proceeds to mention as his residuary legatees.

Taking the whole will together, I am clearly of opinion that the testator intended to treat the mixed *fund, composed of the produce of his real and personal estate, as personalty. I agree entirely with the late MASTER OF THE ROLLS, in thinking that the case of *Durour v. Motteux*[†] is directly in point with the present case; and as Lord HARDWICKE's decision in *Durour v. Motteux* has never been over-ruled, but, on the contrary, has in more than one instance been recognised, I feel myself bound to act upon the authority of that case. It was said that *Durour v. Motteux* was over-ruled by the decision pronounced by Lord BROUGHAM in *Amphlett v. Parke*; but I have seen an accurate note of his judgment in *Amphlett v. Parke*, and it appears to me that Lord BROUGHAM had no intention of over-ruling *Durour v. Motteux* by his decision in that case. On the contrary, he expressly distinguishes *Amphlett v. Parke* from *Durour v. Motteux*, and from the present case of *Green v. Jackson*, which had been decided by the MASTER OF THE ROLLS before Lord BROUGHAM pronounced the judgment over-ruling the same Judge's decision in *Amphlett v. Parke*.

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It was supposed in the argument of the present case, that Lord BROUGHAM considered the cases of *Amphlett v. Parke* and

[†] See *ante*, p. 71.

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Green v. Jackson to be alike, and that the decision in the one must govern the decision in the other; but when I come to advert to the language used by Lord BROUGHAM in his judgment in *Amphlett v. Parke*, I find that so far from his having been of that opinion, he appears to have said directly the reverse. Lord BROUGHAM says, "In *Green v. Jackson*, all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in the executors for certain purposes. 'And I do direct that my said trustees shall pay and apply all the *residue of the monies which shall then be in their hands, unto and among all the children,'—that is the residuary legatees. His Honor held there on the peculiar language of the instrument and the authority of *Durour v. Motteux*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise,—all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it,—among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteux*." It would seem, therefore, that Lord BROUGHAM did not consider that his judgment in *Amphlett v. Parke*, over-ruling the decision of the late MASTER OF THE ROLLS, was at all at variance with the same Judge's decision in *Green v. Jackson*, or that his own decision upon the appeal from the judgment of the MASTER OF THE ROLLS in *Green v. Jackson*, would necessarily have been determined, as has been supposed, by the decision of the House of Lords in *Amphlett v. Parke*, had that case, instead of being compromised, been brought to a hearing.

Without reference, however, to the case of *Amphlett v. Parke*, I am of opinion that the present case falls directly within the principle upon which Lord HARDWICKE decided the case of *Durour v. Motteux*, and I feel myself bound by the authority of that decision. The judgment of the MASTER OF THE ROLLS, therefore, must be affirmed.

FRADELLA *v.* WELLER.

(2 Russ. & Mylne, 247—250.)

1831.
Jan. 31.*Rolls Court.*
LEACH, M.R.
[247]

Where a plaintiff is entitled to have an injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject-matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.

IN the summer of 1828, the plaintiff, having ascertained that three pirated copies, made in France, of an engraving, of which he had the copyright, had been sold by the defendant, filed his bill and obtained an injunction *ex parte*.

The defendant, by his answer, stated that he bought at a shop in London, which he named, some engravings; that among these were the three engravings complained of, which purported to have been engraved at Paris; that he paid 16*s.* for them; that, neither when he bought them nor when he sold them, had he any suspicion or notion that they were piracies, and if he had been aware of their being so, he would not have had any thing to do with them; that he had not sold any copies of the engraving in question, except these three; and that no notice of any complaint against his conduct was given to him before the filing of the bill.

After the injunction had been obtained, the plaintiff had expressed his willingness to proceed no further in the suit, if the costs were paid. The defendant, though willing to submit to the injunction, refused to pay the costs; but took no steps to put in his answer till compelled, or to dissolve the injunction, or to dismiss the bill for want of prosecution.

The plaintiff, having proceeded with the suit, obtained a decree *nisi* by default; and the cause now came *on to be heard on shewing cause against making the decree absolute. [*248]

A witness proved that the defendant had sold three engravings, which were produced to the witness, and were referred to in his deposition as exhibits; and that these three engravings were piracies of a print, also an exhibit, which was the plaintiff's engraving. But all the prints, which had been made exhibits, had been stolen since the former hearing, and none of them were now produced.

FRADELLA
C.
WELLER,

Mr. Pemberton and Mr. Keene, for the plaintiff, were willing to waive the account, but insisted on their right to have a decree with costs against the defendant.

Mr. Bickersteth and Mr. O. Anderdon, for the defendant. * * *

[249] THE MASTER OF THE ROLLS :

The first question is, whether the defendant has been proved to have been guilty of pirating the plaintiff's print. A witness, whose evidence is unopposed, swears that three prints were sold by the defendant, which, on comparison with the original print belonging to the plaintiff, were, he says, clearly pirated. There is no suggestion in the answer that the engravings complained of were not piracies. But, these engravings having been lost or stolen since the examination of the witness, it is said that, when prints are complained of as piracies, it is usual to exhibit to the Court the original and the alleged piracy, and, as that has not been done here, there is no means of judging whether the plaintiff's rights have been invaded. And no doubt it is usual to produce the prints, and the Court may, on the inspection of them, form its opinion; but it is not necessary to produce them, and the Court may decide without inspection. Here it was not made a question in the cause, whether the engravings, of which the bill complained, were piracies of the plaintiff's print: and, the testimony of the witness being unopposed, there is sufficient evidence to charge the defendant with the offence.

It is next said, that the injury complained of is of so small an amount, that costs ought not to be awarded to a plaintiff who prosecutes such a suit to a hearing. I admit that it would not have been fit for the plaintiff to have prosecuted this suit, if the defendant had tendered to him the costs occasioned by his wrong-doing, and by the steps which that wrong-doing had caused the plaintiff to take for his protection. But the defendant did not tender the costs; he must, therefore, be charged with costs. It is not reasonable that a party, whose copyright has been pirated, should *sustain the further injury of having to bear the costs of obtaining protection.

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Let the injunction be made perpetual; let the plaintiff, if he chooses, have an account; and let the defendant pay the costs of the suit.

FRADELLA
v.
WELLER.

The plaintiff waived the account.

WEALL v. RICE.†

(2 Russ. & Mylne, 251—269; S. C. 9 L. J. Ch. 116.)

If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision.

But this presumption may be repelled or fortified by intrinsic evidence from the nature of the two provisions, or by extrinsic evidence of the intention of the testator at the time of making his will.

Slight differences between the two provisions will not repel the presumption against double provisions.

Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature.

Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.

A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3,000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross-remainders. By his will he devised a real estate worth more than 3,000*l.*, in trust for his daughter for life to her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those, who should die under twenty-five without leaving issue, to the survivors: Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband, and children, were not entitled both to the benefits given by the will and to the provisions stipulated for by the articles.

JOHN WEALL, in contemplation of the intended marriage of his daughter Ann with the defendant Henry Rice, executed articles of agreement, dated the 4th of September, 1816, which were in the words following:

“Whereas a marriage being about to take place between my daughter Ann Weall, and Mr. Henry Rice of Jermyn Street,

† *Chichester v. Coventry* (1867) L. R. 2 H. L. 71; *In re Tussaud's Estate* (1878) 9 Ch. Div. 363, 369; *Johnstone v. Haviland*, '96, A. C. 95, 100, 101.

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St. James's, it was agreed that I should advance 3,000*l.* as a marriage portion, to be settled on my daughter and Mr. Rice, and their issue; but being desirous of making a more advantageous arrangement and provision for my daughter and her intended husband and their issue by the said marriage, by settling some *part of my estates in the county of Middlesex, or some other freehold or copyhold estate to be hereafter purchased by me, to the use or in trust for my daughter for life, independent of her husband; and after her decease, to the use of or in trust for Mr. Rice for life, if he should survive her; and after the death of both of them, to the use of or in trust for their children, if they shall have any by the said marriage, as tenants in common in tail, with cross remainders in tail; and on failure of issue by the said marriage, or in case there shall be a child or children by the said marriage, and all and every such child or children shall die under the age of twenty-one years without issue, then to the use of or in trust to return to my own family in such manner as I shall direct: Now, I do hereby agree with Mr. Rice that I will, either by deed or by my last will, settle such a landed estate, part of my present estates, or hereafter to be purchased by me, as shall be of greater value than 3,000*l.*, to the uses and upon the trusts in the manner herein-before expressed, with the usual power of leasing; and in the meantime, and until such estate is settled, I will pay the annual sum of 150*l.* to my said daughter Ann Weall, independent of her husband; and after her decease, to the person or persons who, for the time, would be entitled to the rents and profits of the estates so agreed to be settled in manner before mentioned, if such settlement had been made.—
J. WEALL."

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The agreement, as originally drawn, ended with the following clause: "And, inasmuch as I have not yet made my will, in case I should die before I do make the same, or execute a deed of settlement to the effect herein-before mentioned, then it is agreed, that the said sum of 3,000*l.*, or such interest as my said daughter and Mr. Rice, and their issue, would take under and by virtue of this agreement, shall go ~~and~~ be considered as *part of her share of my personal estate, which she will, in the event of my dying intestate, be entitled to, as one of my children, and shall

be taken into the account of my personal estate accordingly." But these words were erased; the initials of Mr. Weall were written in the margin over against the erasure; and on the document there was a memorandum signed by him, which stated that the erasure was made before he signed the agreement.

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RICE.

The marriage was solemnised.

John Weall, by his last will, dated the 21st of March, 1818, and duly executed and attested, gave and devised, amongst other things, as follows: "Also I give, devise, limit, and appoint all that my farm, consisting of a large barn, and divers closes, fields, or parcels of meadow land, containing by estimation forty-five acres, be the same more or less, partly freehold and partly copyhold, situate, lying and being in the several parishes of Kingsbury and Harrow, or one of them, in the said county of Middlesex, purchased by me of my brother Benjamin, as the same now are in the occupation of John Field, with the appurtenances, to, for, and upon the uses, trusts, intents, and purposes following; that is to say, to the use of my said sons, John Weall and Benjamin Weall, their heirs and assigns, for and during the natural life of my daughter Ann, wife of Henry Rice of Jermyn Street, upon trust to support and preserve the contingent uses and estates herein-after limited from being defeated or destroyed; and, upon further trust, from time to time during the natural life of my said daughter Ann, to pay unto or authorise and permit her to receive the rents and profits of the said farm and lands last above devised, when, and as the same become due and payable from time to time during *the natural life of my said daughter, to and for her own use and benefit, separate and apart from and exclusive of her present or any future husband with whom she may intermarry, and so that the same may not be under his power or controul, or subject or liable to his debts, contracts, forfeitures, or engagements, so that the receipts of my said daughter Ann alone, notwithstanding her present or any future coverture, and whether she shall be married or sole, shall be sufficient discharges for the said rents and profits, and so and in such manner that she, my said daughter Ann, may not sell, charge, alien, assign, incumber, or otherwise anticipate all or any part of the same rents and profits, before

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WEALL
T.
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the same shall become due and payable ; and from and after her decease, then to the use of the said Henry Rice, the husband of my said daughter Ann Rice, in case he shall survive her for and during the term of his natural life, he nevertheless maintaining and educating her said child and children ; and from and after the decease of my said daughter Ann Rice and her said husband, to the use of all and every the child and children of my said daughter Ann Rice, by the said Henry Rice lawfully begotten and to be begotten, to be equally divided between them, if more than one, share and share alike as tenants in common, and not as joint tenants, and his, her, and their respective heirs and assigns for ever : and in case any one or more of such children shall die under the age of twenty-five years without leaving any issue of his, her, or their body or respective bodies lawfully begotten, living at the time of his death or respective deaths, then as, to, for, and concerning the original share or shares of and in the said farm, lands, and hereditaments last above devised, which shall belong to the child or children respectively dying as aforesaid, and also the share or several shares of and in the same farm lands and hereditaments which such *child or children respectively shall take under this provision by way of cross limitations, to the use of the survivor or survivors, other and others of the same children, to be equally divided among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and his, her, and their respective heirs and assigns for ever ; and in case no child of my said daughter Ann Rice shall live to attain the age of twenty-five years, or die under that age leaving such issue as aforesaid, then to the use of such of my children Thomas, John, Benjamin, and Elizabeth Weall, brothers and sister of Ann Rice, as shall be living at the time of her decease, and the lawful issue of such, if any, of them, the said Thomas, John, Benjamin, and Elizabeth Weall, as shall be then dead leaving issue then living, to be equally divided among them, if more than one, share and share alike as tenants in common, and his, her, and their respective heirs for ever ; so, nevertheless, that the issue of a deceased brother or sister of the said Ann Rice take only the share which his, her, or their parent would have taken, if living." [The testator also directed his

executors to invest the sum of 2,500*l.* upon trusts thereby declared for the benefit of his daughter Ann Rice, for her life, for her separate use, and after her decease for her children and their issue as therein mentioned; and in default of such children and issue, upon trust for his other children, Thomas, John, Benjamin, and Elizabeth Weall, and their [respective] issue as therein mentioned.] The testator gave 6,500*l.* for the benefit of his daughter Elizabeth: he bequeathed the residue of his personal estate to his children Thomas Weall, John Weall, Benjamin Weall, Elizabeth Weall, and Ann Rice, in equal shares: and he devised the residue of his real estate to his sons John and Benjamin, and appointed them his executors.

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The testator paid 150*l.* a year to Mr. and Mrs. Rice during his life, and died in October, 1822, without having made any settlement on them in pursuance of the articles of the 4th of September, 1816.

After the testator's death, there were found among his papers two memorandums in his own handwriting. One of them began with the following words: "This is the way I intend to leave my property and estates to my children as below stated, and have given instructions to Mr. Palmer of Rickmansworth this day, the 11th of March, 1818, to make my will as here below stated by me John Weall senior, of Hatch End in the hamlet of Pinner, Middlesex. My will is made by Mr. Palmer, and signed the 21st of March, 1818, by me John Weall senior, and property left as below stated. To my son Thomas Weall in money, 6,000*l.*, to be paid in twelve calendar months. To my son John Weall the land at and in Oxey Lane" (here came an enumeration of parcels); "on the whole, I think and am sure, not worth less than - - - - - £2,800 0 0

Twenty-one acres meadows at Norrid, not			
worth less, I am sure, than - - - - -	1,200	0	0
Money to be paid in twelve calendar months	1,000	0	0

£5,000 0 0"

In another part of this memorandum were the following words: "To Ann Rice the estate at Kingsbury, not worth less, I am sure,

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than 4,000*l.*; money for her to be put in the stocks by the executors and trustees, 2,500*l.*; 6,500*l.* for my daughter Ann Rice."

The other paper began as follows: "The account below is what I think and am sure is owing to me from my sons Thomas, John, and Benjamin Weall, and owing me from other people, and what I have by me in money and stock; what I have here stated is what I am worth besides estates. May 5th, 1821." Then followed a statement of the debts due to him, and of his other property, exclusive of his real estates.

Henry Rice, for himself and his family, having claimed to be entitled as well to the provisions made by the settlement as to the provisions made by the will; the bill was filed by John Weall, Benjamin Weall, and Thomas Weall, for the purpose of having it declared that Mr. Rice and his wife and children were bound to elect between the provisions made for them by the will and those of the settlement.

Henry Rice, by his answer, alleged that the testator, before signing the agreement of the 4th of September, 1816, stated that the 3,000*l.*, mentioned in it as his daughter's portion, was an equivalent for the sums which he already had given to his sons for their advancement; that he should provide for all his children alike; and that, at his death, the remainder of his property should be divided equally among them. Both he and his wife insisted that they and their children were entitled to the benefits given them by the will, as well as to the provisions secured to them by the agreement.

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Mr. Tinney and Mr. Barber, for the plaintiffs.

Mr. Bickersteth and Mr. Stuart, for Mr. and Mrs. Rice.

Mr. Pemberton and Mr. Norton, for the children of Mrs. Rice.

The two memorandums in the testator's handwriting, which are before stated to have been found among his papers, were tendered in evidence by the plaintiffs, in order to shew that the testator did not intend that Mrs. Rice and her family should

have any share of his property, except that which was given to them by the will. * * *

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The MASTER OF THE ROLLS admitted the first paper; stating that he considered it to be settled by the cases of *Hinchcliffe v. Hinchcliffe*† and *Pole v. Lord Somers*,‡ that declarations of the parent, referring to his intention at the time of making his will, whether made at the time, or before, or after, were admissible evidence to prove that he did not mean to give a double provision. But he rejected the second paper, upon the ground that it had no reference to the intention of the testator.

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On the principal question the following [among other] authorities were cited in the course of the argument: [*Blandy v. Widmore*; § *Lee v. D'Aranda*; || *Devese v. Pontet*; ¶ *Jones v. Martin*; †† *Randall v. Willis*; ‡‡ *Lewis v. Madocks*; §§ *Couch v. Stratton*; ... *Tolson v. Collins*; ¶¶ *Twisden v. Twisden*; ††† *Garthshore v. Chalie*; ‡‡‡ *Wallace v. Pomfret*; §§§ *Bengough v. Walker*; ... || *Goldsmid v. Goldsmid*; ¶¶¶ *Wathen v. Smith*.††††]

THE MASTER OF THE ROLLS :

Feb. 25.

In the argument of this case, I believe every authority has been cited which can bear upon the question. I do not think necessary to avert to them particularly; but I shall endeavour to state distinctly the principles which I extract from the cases, and upon which my judgment proceeds.

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The rule of the Court is, as, in reason, I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision; but this presumption may be

+ 4 R. R. 89 (3 Ves. 516).

† See 12 R. R. 36, n. (6 Ves. 309).

§ 2 Vern. 709; 1 P. Wms. 324.

| 1 Ves. sen. 1; 3 Atk. 419.

¶ 1 R. R. 15 (1 Cox, 288).

†† 5 R. R. 32 (5 Ves. 266, n., 3 Anst. 882).

‡‡ 5 R. R. 40 (5 Ves. 262).

§§ 7 R. R. 10 (8 Ves. 150; 17 Ves. 48).

||| 4 R. R. 230 (4 Ves. 391).

¶¶ 4 R. R. 264 (4 Ves. 483).

††† 7 R. R. 251 (9 Ves. 413).

‡‡‡ 7 R. R. 311 (10 Ves. 1).

§§§ 8 R. R. 241 (11 Ves. 542).

|||| 10 R. R. 106 (15 Ves. 507).

¶¶¶¶ 18 R. R. 60 (1 Swanst. 211).

†††† 20 R. R. 302 (4 Madd. 325).

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repelled or fortified by intrinsic evidence derived from the nature of the two *provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature; and every Judge must decide that question for himself.

In the present case, the two provisions appear to me substantially of the same nature: and I consider that, the wife taking in both instruments to her separate use, it is but a slight difference that in the will she is restrained from anticipation and alienation—that, the husband taking in both instruments an estate for life in remainder, it is but a slight difference that in the will it is expressed that he is to maintain and educate his children—that it is but a slight difference that by the settlement the children take as tenants in common in tail with cross remainders, and that by the will they take as tenants in common in fee, and that the testator has expressed an intention to give them cross remainders by a void executory devise, if any of them die under twenty-five. These differences, as I have before observed, appear to me to leave the two provisions substantially of the same nature. My opinion, therefore, is that if in this case there were no extrinsic evidence, Mr. Rice and his family could not claim the double provisions.

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But in this case there appears to me to be extrinsic evidence, which is conclusive upon the question, that, *at the making of the will, the testator did not intend a double provision. Upon referring to the paper written by him as instructions for his will, it is apparent that he means to dispose of his whole property, and as between his two daughters, he gives the same bounty; and it must be inferred, that when he says that he gives to Mrs. Rice an estate “not worth less, he is sure, than 4,000*l*,” he has

expressly in view the articles by which he had bound himself to provide for her and her family an estate of greater value than 3,000*l.* His plain apparent intention, therefore, at the time of making his will, would be wholly defeated, if the double provision were to take effect; and upon this paper alone, the claim of Mr. Rice and his family would fail.

It is argued, that the children of the marriage are not bound by the same principles. There is no ground for this distinction: the intention of the testator, which governs this case, applies to the whole family. All must elect between the two provisions.

[And see next case.]

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(2 Russ. & Mylne, 270—300; S. C. 9 L. J. Ch. 130.)

Ademption. A testator, who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will and settlement, to be considered *in loco parentis*; and the presumption against a double provision, which would arise in the case of a father, will apply to such a case.

In such a case, parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was *in loco parentis*.

It being proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other, that they could not be considered substantially the same.

The legacy was not set up by a codicil, made after the settlement, ratifying and confirming the will and all the devises and bequests therein contained.

MISS GRANT WAS one of the nearest relations of the late Lord Milford, being descended from a brother of his grandfather; and her brother, the defendant, Sir Richard Phillips, was the devisee of his large estates. The father of Miss Grant died, leaving *his family wholly unprovided for; and after his death, Miss Grant resided until her marriage, not with her mother, who survived

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Jan. 14.
Feb. 7, 28.

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† See last case.

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the father, but with one of her aunts. During the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and Lord Milford; and, the grandfather also having died in her infancy, and left her one third of his residuary estate, which amounted to about 1,500*l.*, Lord Milford from that time made her an annual allowance, by which and the income of the 1,500*l.*, but with some encroachment also on the principal, she was maintained and educated. Her aunt from time to time consulted Lord Milford as to the plan of her education; and Miss Grant was occasionally a visitor at Lord Milford's house.

In October, 1818, Dr. Booker made an offer of marriage to Miss Grant by a letter, which Miss Grant transmitted to Lord Milford, enclosed in a letter from herself, requesting his Lordship's approbation of the proposal. In answer to this application, Lord Milford referred her to his solicitor, Mr. Ranken; and on the 29th of October, he wrote a letter to Mr. Ranken, enclosing hers, in which he said, "I have referred her to you for my sentiments on this business; and I trust you will not flatter her with any hope of my consent to her union with Dr. Booker, until it can be found that he has an equivalent to settle upon her." On the 31st of October, 1818, Mr. Ranken wrote to Miss Grant, informing her that, before Lord Milford would give his consent to the match, a settlement must be made by Dr. Booker at least equal to what would be made on her part, and that he was not authorised by his Lordship to name any particular sum. Notwithstanding this, the marriage took place on the 3rd of November following, without the previous knowledge or approbation of Lord Milford.

[272] Between the 19th of November and the 1st of December, 1818, several interviews took place between Dr. Booker and Mr. Ranken; when it appeared that Dr. Booker had not any property which he could make the subject of a settlement: but he offered to insure his life for 2,000*l.*, and to settle the policy, together with 1,000*l.* which remained of the fortune Mrs. Booker took under the grandfather's will, on her and the issue of her marriage. These circumstances being communicated to Lord Milford, a letter, dated the 5th of December, and written on his Lordship's

behalf by his secretary, was sent to Mr. Ranken, which contained the following passage: "In respect to Mrs. Booker's settlement, it is his intention at his decease to leave her 4,000*l.*, and to allow her 100*l.* per annum, to be paid half-yearly; the first payment to be made July 1st, 1819." After the lapse of some time, Dr. Booker having effected an insurance on his life for 2,000*l.* with the view of making it the subject of settlement, he and his wife were anxious that Lord Milford should be a party to the proposed deed, and should covenant for the payment of the 4,000*l.*, and the annuity of 100*l.* a year; and this request Mr. Ranken communicated to Lord Milford. His Lordship was at first averse to complying with the application, and stated that he thought Dr. Booker and Mrs. Booker ought to be satisfied with his assurance that he would make by his will the provision he had promised them; but he afterwards consented to be a party to the settlement, and to covenant for the payment of 4,000*l.* at his decease.

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Accordingly, an indenture of settlement, bearing date the 21st of June, 1820, was on that day made and executed between and by Luke Booker and Elizabeth his wife of the first part, Richard Lord Milford of the second part, and Charles Ranken and William Evans of [the third part, whereby a sum of 1,000*l.* Bank Annuities were transferred by Luke Booker to Ranken and Evans, in trust for himself for life, and after his decease for Elizabeth his wife for life, and after the decease of the survivor for their children, as they or the survivor of them should appoint, and in default of appointment, for the children in the usual manner, and in default of children for the appointees or next of kin of Elizabeth Booker].

The policy of assurance, too, was assigned to Ranken and Evans, who were to stand possessed of all sums of money which should be received in respect of it, and the securities in which they might be invested, on the same trusts and subject to the same provisos and powers as were expressed concerning the 1,000*l.* [Bank Annuities]: and Dr. Booker covenanted to keep the policy on foot at his own costs.

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The indenture then recited that, upon the treaty for the marriage, it was agreed that Lord Milford should enter into a

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covenant for payment of the sum of 4,000*l.* within six calendar months next after his decease, to trustees for the benefit of Luke Booker and Elizabeth his wife and their children, and with such limitations over as were therein-before mentioned: and accordingly Lord Milford [covenanted with Ranken and Evans, that his heirs, executors, or administrators would, within six calendar months next after his decease, pay unto the trustee or trustees for the time being acting in the execution of the said indenture, the principal sum of 4,000*l.* but without any interest for the same: And it was declared that the trustee or trustees should invest the same as therein mentioned, and should hold the investments and the income thereof, upon the same trusts, as were therein-before declared, concerning the said sum of 1,000*l.* Bank Annuities, and the income thereof].

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After the marriage of Dr. Booker and Elizabeth Grant, but before the execution of the settlement, Lord Milford had made his will, dated on the 21st of January, 1820, [whereby he gave to James Ackland, and John Hensleigh Allen, the sum of 4,000*l.* upon trust, to invest the same as therein mentioned, and, during the life of his relative Elizabeth Booker, to pay the income thereof to her for her separate use, and after her decease, upon trust, to pay and transfer the said principal money, stocks, funds, and securities, unto all and every the children of the said Elizabeth Booker, share and share alike, the shares of sons to be paid or transferred to them at 21, and the shares of daughters at 21 or marriage, with a gift over to the survivors or others of the share of any child who should die before attaining a vested interest, and with power to apply the income for the maintenance or education of children until their shares were vested: and in default of such children, immediately after the decease of the survivor of the said Elizabeth Booker, and of such children upon trust to pay the income of the said investments to Maria Phillipa Gwyther and her assigns during her life, and after her decease, to Maria Phillipa, the daughter of the said Maria Phillipa Gwyther, until she should attain the age of twenty-one years, or be married, and when she should attain that age, or be married, upon trust to pay and transfer the whole of the said trust monies, stocks, funds, and securities, unto the said Maria Phillipa Gwyther, for

her own absolute use and benefit: but in case the said Maria Phillippa Gwyther should die, before she should attain the age of twenty-one years or be married, then the whole of the said principal monies, stocks, funds, were to be held upon the like trusts, and for the like purposes, as were therein-after declared with respect to the residue of his personal estate. He appointed the said James Ackland and John Hensleigh Allen his executors.]

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In September, 1820, Lord Milford made a codicil to his will, giving a small annuity; and in October, 1820, *another codicil, giving another small annuity. James Ackland having died, his Lordship made a third codicil, dated the 28th of July, 1821. After mentioning the death of Ackland, and expressing his desire to appoint John Phillips Adams a trustee and executor in his stead, and to give another legacy in addition to those given by his will, he, by this codicil, which he directed to be taken as part of his will, appointed John Phillips Adams to be a trustee in conjunction with Hensleigh; and, for further effectuating his said desire, he “gave, devised, and bequeathed unto the said John Phillips Adams and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, all and singular so much and such part of his real and personal estate as were by his said will given, devised, and bequeathed unto the said James Ackland and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, to have, hold, receive, and take the same unto and by the said John Phillips Adams and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively, for and during the like estates and interests, in the like manner, to, upon, and for the like uses, trusts, interests, and purposes, and with, under, and subject to the like powers, provisos, conditions, declarations, and agreements as were in and by his said will given, devised, bequeathed, limited, directed, expressed, declared, and contained of and concerning the same parts of his said real and personal estates so thereby given, devised, and bequeathed unto the said James Ackland and John Hensleigh Allen, their heirs, executors, administrators, and assigns respectively as aforesaid.” The testator then gave, devised, and bequeathed unto the said John Phillips Adams the sum of 100*l.*, to be paid to him immediately after his decease,

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and nominated, constituted, and appointed the said John Phillips Adams and *John Hensleigh Allen executors of his said will and of that his said codicil, upon the trust aforesaid : and he thereby “ratified and confirmed his said will, and all devises and bequests, matters and things therein mentioned and contained, and not thereby and therein revoked, altered, or varied.”

Lord Milford, on the 14th of October, 1822, made a fourth codicil, bequeathing three small legacies.

Lord Milford died on the 28th of November, 1828 ; Mrs. Booker died in January, 1826, leaving her husband and four infant children her surviving.

The bill was filed by the children of Dr. and Mrs. Booker for the purpose of asserting their title to the benefits given them by Lord Milford’s will, in addition to the provisions made for them by his covenant in the settlement. * * *

[287] According to the evidence, Lord Milford had contributed regularly to the maintenance and education of Mrs. Brooker before her marriage, and was consulted as to the mode of bringing her up ; and she was frequently at his house as a visitor. About the time when she came of age, a proposal of marriage was made to her by a Mr. Unthank, and upon that occasion she applied to Lord Milford for his consent to the match. Lord Milford approving of the marriage, authorised his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss Grant, was the sum of 4,000*l.* to be paid at his *death. Accordingly the father of the intended husband, who was a solicitor, prepared a draft of a settlement ; by which the sum of 4,000*l.* was to be settled on Miss Grant and the intended husband and their issue. This draft was submitted to Lord Milford’s solicitor for his perusal, and, being approved by him, was afterwards engrossed ; but, finally, the marriage with Mr. Unthank did not take effect.

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In 1815, another offer of marriage was made to Miss Grant, on which Lord Milford was consulted ; and communications took place between him and the intended husband as to the amount of the provision which he meant to make for the lady ; but this negotiation, also, was ultimately broken off.

Mr. Ranken, in his deposition, after proving the circumstances

connected with the proposal of marriage on the part of Dr. Booker, stated, that, “about the time when Richard Lord Milford did so consent to concur in such settlement, he expressly informed deponent, and desired deponent to inform the defendants, Luke Booker and Elizabeth his wife, that he had done so on the recommendation of the deponent for their satisfaction; and that the provision, which he had agreed to make by such settlement, was in lieu of the provision which he had promised and agreed to make by his will for the said Elizabeth Booker; and that he, deponent, did so expressly inform the defendants, Luke Booker and Elizabeth Booker, accordingly.

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Mr. Pemberton and Mr. Wheatley, for the plaintiffs:

* * In the present case the two provisions are essentially different. Under the will, Dr. Booker takes nothing, and Mrs. Booker takes an immediate estate for life to her separate use; the settlement gives Dr. Booker a life interest, and gives Mrs. Booker nothing till after his death; under the will, the children, on the death of their mother, become entitled to the 4,000*l.* in equal shares; under the settlement, their interests are postponed till the death of their father, and are subject to a power of appointment. Even, therefore, if the provision had come from a parent, it would be impossible to contend that the settlement was either a satisfaction or an ademption of the legacy. * * *

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If the settlement were, in itself, a satisfaction or ademption of the legacy given by the prior will, the third codicil will prevent that consequence from ensuing. The codicil republishes the will; it makes the will speak from that date; and it expressly ratifies and confirms all the bequests contained in the will. * * *

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Mr. Tinney and Mr. Harwood, for Dr. Booker.

Mr. Bickersteth, for the residuary legatee :

* * Lord Milford voluntarily took upon himself obligations which law or nature did not impose upon him; and he is entitled to the benefit of all the presumptions which would exist between a parent and child. The consequence is, that evidence may be

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BOOKER received that a provision made by him on the marriage of the
 v. lady was a satisfaction of a legacy given her by his will : *Ex parte*
 ALLEN. *Pye*,† *Hartopp v. Hartopp*.‡ * * *

If the legacy given by the will is to be considered as satisfied by the provision made by the settlement, it is in substance adeemed : it ceases to be an operative part of the will, and the subsequent codicil cannot operate as a new gift : *Izard v. Hurst*,§ *Drinkwater v. Falconer*,|| *Crosbie v. MacDoual*,¶ *Monck v. Monck*.†† * * *

[293] *Mr. Pemberton* in reply.

Feb. 28. THE MASTER OF THE ROLLS :

[296] On the 3rd of November, 1818, a marriage was had between Dr. Booker, one of the defendants, and Miss Elizabeth Grant, his late wife. Miss Grant was a cousin and one of the nearest relations of the late Lord Milford, who died unmarried and without issue ; and her brother, the defendant Sir Richard Phillips, was the devisee of his great estates. The father of Miss Grant died, leaving his family wholly unprovided for. Miss Grant's mother survived the father ; but after the death of the father Miss Grant resided, not with her mother, but with one of her aunts until her marriage ; and, during the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and Lord Milford. The grandfather also died in her infancy and left her one third of his residuary estate, which amounted to the sum of 1,500*l.*, and after the death of the grandfather, Lord Milford made her an annual allowance, by which and the income of the 1,500*l.* she was maintained and educated. Her aunts from time to time consulted Lord Milford as to the plan of her education, and Miss Grant occasionally visited Lord Milford. About the time of her coming of age, a proposal of marriage was made to her by a Mr. Unthank ; and upon that occasion Miss Grant applied to Lord Milford for his consent to the marriage. Lord Milford, *approving of the marriage,

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† 11 R. R. 173 (18 Ves. 140).

‡ 11 R. R. 48 (17 Ves. 184).

§ 2 Freem. 224 ; 2 Eq. Ca. Ab. 769.

|| 2 Ves. Sen. 623.

¶ 4 R. R. 301 (4 Ves. 610).

†† 12 R. R. 83 (1 Ba. & Be. 298).

authorised his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss Grant, was the sum of 4,000*l.* to be paid at his death; and a draft of a settlement was in consequence prepared by the father of the intended husband, who was a solicitor, and was submitted to Lord Milford's solicitor for his perusal. Being approved by him, it was afterwards engrossed; and by it the sum of 4,000*l.* was to be settled on Miss Grant and the intended husband and their issue; but the marriage with Mr. Unthank did not take effect.

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The offer of marriage, made by Dr. Booker to Miss Grant, was by a letter, which Miss Grant inclosed to Lord Milford, requesting his approbation; and in answer to such letter Lord Milford desired his solicitor to communicate to Miss Grant, that before he would give his consent, he must require from Dr. Booker a settlement on his part equal to what might be made on the part of Miss Grant. The solicitor of Lord Milford had afterwards several interviews with Dr. Booker, when it appeared that all that Dr. Booker could do was to insure his life for a sum of 2,000*l.*, and to settle on Miss Grant and her issue the policy of assurance, and 1,000*l.* which then remained to her of her fortune under the will of her grandfather; and at the time, Lord Milford's solicitor, at Lord Milford's desire, communicated to Dr. Booker that it was his intention at his decease to leave Miss Grant 4,000*l.*, and to give her an annuity of 100*l.* per annum during her life. Miss Grant afterwards married Dr. Booker, without any settlement being made. But, after the marriage, the solicitor of Lord Milford, at the request of Dr. and Mrs. Booker, applied to Lord Milford to make the settlement which he had proposed; and thereupon Lord Milford stated, that he thought the parties ought to be satisfied with his assurance that he would make his will as he had *promised to do. Subsequently, however, Lord Milford, at the request of his solicitor, consented to execute a deed for the payment of the 4,000*l.* at his death, but expressly desired his solicitor to inform Dr. and Mrs. Booker that he consented to do so upon the recommendation of his solicitor and for the satisfaction of Dr. and Mrs. Booker, and that the provision, which he agreed to make

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by such settlement, was in lieu of the provision which he had promised and agreed to make for Mrs. Booker by his will. Thereupon the indenture of settlement, bearing date the 21st of June, 1820, was executed.

Lord Milford had previously, namely, on or about the 21st of January, 1820, made his will of that date, whereby he gave a sum of 4,000*l.* upon trust, to pay the dividends to Mrs. Booker for life to her separate use; and after her death, for the children of the marriage in equal shares; the shares to vest in sons at twenty-one, and in daughters at twenty-one, or marriage; with a limitation over, if there was no child of the marriage who attained a vested interest, to the mother of Mrs. Booker during her life, and after her death, to Mrs. Booker's sister of the half blood. After the settlement, Lord Milford published four codicils to his will; and by the 3rd of these, which bore date on the 28th of July, 1821, he ratified and confirmed his will and all the devises and bequests therein contained, which were not varied or revoked by the codicil.

Lord Milford died on the 28th of November, 1823: Mrs. Booker died in the month of January, 1826, leaving the defendant Dr. Booker her surviving, and the four infant plaintiffs, her children: and the bill was filed by the infants claiming for themselves and their father the benefits of the two provisions made by the will and settlement.

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It was argued for the plaintiffs, that the rule of presumption against double portions did not apply in this case; Lord Milford not being the parent nor to be considered *in loco parentis*; that, if Lord Milford could be considered as standing *in loco parentis*, the provisions in the settlement were of a different nature from those in the will; and that, after making the settlement, the provisions by the will were expressly confirmed by the language of the third codicil.

In the argument it was made a question, whether parol evidence was admissible to prove that a testator was to be considered as having placed himself *in loco parentis*. I find no authority for excluding such evidence; and inasmuch as the conclusion is to arise from facts extrinsic of the will, I am of opinion, that parol evidence is admissible for such purpose. I am further of opinion,

that Lord Milford is to be considered as having placed himself *in loco parentis*; it being established by the evidence, that Lord Milford had not only contributed to the maintenance and education of Mrs. Booker, who appears to have been one of his nearest relations, from the time she lost her father in her early infancy, but that he was consulted as to the plan of her education and was regarded by Mrs. Booker as the person whose consent was necessary to her marriage, and that he had expressly taken upon himself the obligation to make a provision for her in that event.

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The presumptions against a double portion, which arise in the case of two provisions made by a parent, arise in the case of the two provisions here, and are to be fortified or repelled by intrinsic or extrinsic evidence. In this case the provisions by the two instruments can hardly be considered substantially of the same nature; so as to afford intrinsic evidence against a double provision; but it is proved by Lord Milford's solicitor, *who prepared the settlement, that, when, by the desire of Dr. and Mrs. Booker, he applied to Lord Milford upon the subject of the settlement, Lord Milford stated that Dr. and Mrs. Booker ought to have been satisfied with his assurance that he would make his will as he had promised to do, and that when Lord Milford consented to execute the settlement, he directed his solicitor to inform Dr. and Mrs. Booker that the settlement was in lieu of the provision which he had promised to make by his will. The extrinsic evidence, therefore, excludes the intention of a double provision.

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Being of opinion that Lord Milford is to be considered as having placed himself *in loco parentis*, it is not material to the decision to say what would have been the effect of this declaration of his intention, if he could not be so considered.

It is argued that the third codicil, which was made by Lord Milford long after the settlement, and which in words ratifies and confirms the will and all devises and bequests therein contained and not altered or revoked by the codicil, manifests an intention on the part of Lord Milford in favour of the double provision. In my judgment, the true construction of this codicil is, that the will is to have the effect which it would have had, if the codicil had not been made, except as altered by the codicil, and that if the double provision would not have taken place if the codicil

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had not been made, it will not be set up by that codicil. This reasoning is consistent with the decision in *Crosbie v. MacDougal*† and the other cases which have been cited.

Declare therefore that the provision made by the settlement for Dr. and Mrs. Booker and their children is a satisfaction of the provision intended for Mrs. Booker and her children by the will.

1831.
Jan. 19, 20.

Rolls Court.
LEACH, M.R.
[304]

CARVER v. BOWLES.†

(2 Russ. & Mylne, 301—309; S. C. 9 L. J. Ch. 91.)

A testator, having under a settlement a power of appointing by will a sum of 7,150*l.* Bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of 715*l.* 5 per cent. stock, appointed the said sum of 7,150*l.* Bank stock and the said sum of 715*l.* 5 per cent. Bank Annuities, "together with all such further additions in the nature of profit to be made to the said Bank stock in his lifetime:" Held, that the appointment extended to all the bonuses.

A testator, having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held,

That the shares of the settled fund were well appointed to the daughters absolutely, but to their separate use during their respective lives, and without power of anticipation or alienation:

That no case of election was raised in favour of the issue of the daughters against the daughters or their husbands.

By an indenture, dated the 16th of January, 1799, which was executed in contemplation of the marriage of the testator H. C. Bowles and Ann Garnault, a sum of 7,150*l.* Bank stock, which had belonged to Mr. Bowles, was settled upon the husband and wife and the survivor of them for life; and after the decease

† 4 R. R. 301 (4 Ves. 610).

‡ *Churchill v. Churchill* (1867) L. R. 5 Eq. 44, 49; *Crawshay v. Crawshay* (1890) 43 Ch. D. 615, 59 L. J. Ch. 395, 62 L. T. 489; *McDonald v.*

McDonald (1875) L. R. 2 Sc. App. 482, 488; *Warren's Trusts* (1884) 26 Ch. D. 208, 53 L. J. Ch. 787, 50 L. T. 454.

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of the survivor, upon trust to transfer the Bank stock unto, between, and amongst all and every the child and children, or such one or more child or children, or an only child of the said marriage, at such time or times, in such shares, proportions, manner and form, and with, under, and subject to such powers, provisos, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their issue), as the said H. C. Bowles and Ann Garnault should, in manner therein mentioned jointly appoint; and for want of such joint appointment, as the survivor of them should, after the death of the other, by deed, or by his or her will, or any codicil thereto, direct or appoint; and in case of no such direction or appointment by them, or by the survivor of them, and as to so much whereof no such direction or appointment should be made, upon trust for all the children in equal shares, and if but one, then to such only child, and to be paid and transferred at the times therein mentioned.

The marriage took place; there were five children of the marriage, two sons, and three daughters: and the wife died in the lifetime of the husband without having joined in any appointment of the Bank stock.

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In June, 1799, there was paid in respect of the 7,150*l.* Bank stock, a bonus of 715*l.* five per cent. Bank Annuities, which sum was transferred into the names of the trustees of the settlement; and in the following December, a memorandum, signed by the husband and wife, was indorsed on the settlement, by which it was declared that the 715*l.* five per cent. stock was to be subject to the trusts which the indenture declared concerning the Bank stock. In the year 1802, a bonus in money was paid, which Mr. Bowles invested in the purchase of Bank stock in the names of the trustees; and in June, 1816, an addition of 25 per cent. was made to the stock by way of bonus. By these means, the Bank stock in the names of the trustees was augmented to 9,216*l.*

The will of H. C. Bowles, dated the 18th of April, 1827, after reciting that, by his marriage settlement and the indorsement upon it, 7,150*l.* Bank stock, and 715*l.* five per cent. Bank Annuities, being an addition made to the Bank stock in the nature of profit, were standing in the names of trustees in trust, after his

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decease, for all or any one or more of his children, and in such manner &c. as he should by will appoint, proceeded in the following words, "Now, in pursuance of the said power or authority to me given or reserved in and by my said marriage settlement, and by force and virtue thereof, and of every power or authority to me given or reserved, or enabling me in this behalf, I do, by this my last will &c., direct and appoint, give and bequeath the said sum of 7,150*l.* Bank stock, so mentioned in my said marriage settlement, and also the *said sum of 715*l.* five per cent. Bank Annuities, together with all such further additions in the nature of profit to be made to the Bank stock in my lifetime, unto my five children, Henry Carrington Bowles, Ann Sarah Treacher, Jane Mary Reeves, Francisca Bowles, and John Bowles, equally to be divided among them, share and share alike. But I do hereby will and declare, that one-fifth part or share, so appointed and bequeathed to each of my said three daughters, of and in the said 7,150*l.* Bank stock, and 715*l.* five per cent. Bank Annuities, is so appointed and bequeathed, and I do hereby, so far as I lawfully or equitably may or can, order and appoint, that the same shall be held and applied by my executors and trustees hereinafter named, upon and for the same trusts, intents and purposes, for the benefit of each of my said daughters and their issue, as are hereinafter expressed and directed of and concerning the one-fifth part or share hereinafter bequeathed in favour of each such daughter and her issue, of and in my residuary personal estate." These trusts were [to pay the interest to the daughter during her life for her separate use without power of anticipation and after her decease for her children as she should by deed or will appoint, and in default of appointment for all her children equally who being sons should attain twenty-one, or being daughters should attain twenty-one or marry, and in default of children for such trusts and purposes as the daughter should appoint, and in default of appointment for the person who at her decease would have been her next of kin if she had died intestate and unmarried]. The will also contained a proviso "that no child, taking a share under any such appointment as aforesaid, shall be entitled to any further or other share of and in the remaining or unapplied part or parts of the said one

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fifth part, unless and until he or she have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly."

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At the date of the will, the 715*l.* five per cents had been converted into a larger amount of 8 per cent. stock.

Under these circumstances the following questions were raised :

I. Whether the appointment extended to the bonuses of 1802 and 1816, or was confined to the original sum of 7,150*l.* Bank stock, and the stock into which the 715*l.* five per cent. Bank Annuities were converted.

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Mr. Tinney and *Mr. Teed* argued that, by the express words of the will, the appointment was limited to the original amount of stock and the first bonus, and to such additions by way of bonus as might be made after the date of the will ; and that there were no words which could be fairly extended to the intermediate bonuses.

The MASTER OF THE ROLLS was of opinion that the erroneous allusion in the will to the 715*l.* as an existing five per cent. stock, though it had been long converted into a different amount of a different stock, shewed that the testator was not acquainted with the particulars of which the accumulated fund consisted, and that his intention was to appoint the whole of that fund which was vested in the trustees of the settlement.

II. As the appointment was bad so far as it attempted to create trusts in favour of the children of the daughters, the grandchildren of the testator not being within the objects of the power, a second question was, whether the shares were well appointed to the daughters absolutely, or whether after the life estates given to the daughters, these shares were to be considered as unappointed.

If the shares were well appointed to the daughters absolutely, another question was, whether the restriction against anticipation or alienation and the limitations to the separate use of the daughters during their lives were valid, having regard to the terms of the power contained in the settlement.

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THE MASTER OF THE ROLLS held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use and to restrain them from anticipation or alienation.

III. It was then contended on behalf of the issue of the daughters, that, as the testator had manifested a plain intention that the children of the daughters should take interests in the settled fund, and as, by the same instruments, he gave to his daughters shares of his residue, a case of election was raised against the daughters; and the daughters were bound to elect between giving effect to the appointment in favour of their children and the interests which they, the daughters, took under the will: *Whistler v. Webster*.†

The MASTER OF THE ROLLS held that, the testator having made an absolute appointment in the first instance, no case of election was raised.

GILL v. SHELLEY.‡

(2 Russ. & Mylne, 336—343; S. C. 9 L. J. Ch. 68.)

1831.
Jan. 28.
Rolls Court.
LEACH, M.R.
[336]

A testatrix gave a share of her residuary estate to the children of Mary Gladman deceased. Mary Gladman left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of Mary Gladman; that the testatrix well knew that fact, and that Mary Gladman left only those two children.

THE testatrix, Elizabeth Merricks, the wife of James Merricks, being empowered by her marriage settlement to dispose of her estate notwithstanding her coverture, did, by her will, give the whole of her estate, both real and personal, to her husband for his life, and after his death she gave parts thereof to different persons; and as to her residuary estate she directed her trustees

† 2 R. R. 260 (2 Ves. J. 367).

‡ *In Re Horner* (1887) 37 Ch. D. 695, 57 L. J. Ch. 211, 58 L. T. 103.

and executors “to divide, share, and pay the same equally to, between, and amongst Anne Maria Hall, widow, now or lately residing at Carter’s Corner in the parish of Hellinsley, the adopted daughter of Thomas Colbran, heretofore of Hailsham, yeoman, deceased, the before named and described Sarah Kennet and Thomas Martin respectively, notwithstanding the bequests hereinbefore made to them, and over and above the same respectively; and also to and between and amongst all and every the legitimate children of my relations who (those who are relatives) were, are, or may be in consanguinity to me of the degree of first cousins, either paternally or maternally (except the before named Elizabeth Stephens, whom I exclude from receiving any part or share of the same); and in this last bequest I include William Freeman, the son of the late Charles Freeman of the Cliffe aforesaid, grocer, Elizabeth Merricks (deceased), the grandson of the before named Henry Freeman and Mary his wife, intending that he the said William Freeman shall have and take such part, share, and interest therein, as his father the said Charles Freeman deceased would have been entitled to if living under this my will in this particular respect; and in case any of the parties, or any of the children of *my said relatives, to whom I have given a distributive share of the residue and remainder of my said real and personal estate, or of any other description of estates not hereinbefore disposed of, and amongst whom I include the children of the late William Martin of Hailsham aforesaid, shopkeeper and farmer, deceased; also the children of the late Elizabeth Hastings of Hailsham aforesaid, deceased (before Elizabeth Martin); also the children of the late Mary Gladman, of East Dean in the said county of Sussex, deceased (before Mary Blackman), and likewise the children of such of them my said relatives last before described, as shall happen to die in my lifetime or in the lifetime of my said husband, the share of him, her, or them so dying, shall go, and be payable, and paid equally to and amongst the children of such deceased person or persons.”

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The testatrix died in the year 1827.

At the time of making her will, there were living two children of Mary Gladman, who was then dead, and was described in the

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will as the late Mary Gladman: one of them, the defendant Charlotte Shelley, was an illegitimate child, born before the marriage of her mother with John Gladman, and the other, a legitimate child, born after the mother's marriage.

Mary Gladman was the daughter of Joseph and Mary Blackman, which Mary Blackman was a first cousin of the testatrix.

The husband of the testatrix had died: and the question in the cause was, whether the defendant Charlotte Shelley was entitled to share in the testatrix's residuary estate as one of the children of the late Mary Gladman.

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It was proved in the cause, that Charlotte Shelley was an illegitimate child of Mary Gladman, and born in the year 1796; that Mary Gladman was acquainted with the testatrix before the birth of the child; that, prior to her marriage, and soon after the birth of the defendant Charlotte Shelley, she went to live in the house of the testatrix, and that the testatrix was well aware that Mary Gladman had such illegitimate child; that the child, when quite an infant, and during the residence of the mother with the testatrix, was frequently brought to the house of the testatrix, and treated affectionately by the testatrix; that, Mary Gladman being uneasy at her separation from her child, the testatrix proposed that the child should reside with some person near to her, and offered to pay the extra expense which would thereby be occasioned; that the defendant Charlotte Shelley went by the name of Blackman, was put out to nurse for the first year after her birth, and afterwards resided with the father and mother of Mary Gladman until the marriage of Mary Gladman, and from that time she resided with John Gladman and Mary Gladman until the death of Mary Gladman; that Mary Gladman, after her marriage and until her death, resided with her husband at the distance of nine or ten miles from the testatrix, and continued to be in the habit of going to the house of the testatrix until she died; that she frequently took her two children with her to visit the testatrix, and that the testatrix well knew that Mary Gladman had only one child after her marriage.

Mr. Bickersteth, for the plaintiffs.

Mr. Pemberton and Mr. Wigram, for Charlotte Shelley [cited *Woodhouselee v. Dalrymple*,† and *Wilkinson v. Adam*‡].

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Mr. Bacon, for the representatives of James Gladman, the only legitimate child of Mary Gladman [cited *Hart v. Durand*,§ and *Swaine v. Kennerley*||].

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Mr. Pemberton, in reply, said, that the rule that children and illegitimate children could not take together under the general description of children, applied only to cases in which the word was used to describe a class, and not where (as in the case before the Court (the word clearly described particular individuals: that if, in *Wilkinson v. Adam*, the testator had survived his wife and married Ann Lewis, the legitimate children of that marriage would have taken jointly with the illegitimate children, in whose favour the cause was decided: that *Swaine v. Kennerley* was distinguishable from the case before the Court, because it did not appear that, in that case, the facts were known to the testator; that the same remark applied to *Hart v. Durand*, for, as the testator there spoke of sons, when there was no legitimate son and only one illegitimate son, the will shewed that he was not acquainted with the state of J. Durand's family; and besides, the evidence in that case was tendered to prove the testator's intention to comprehend illegitimate children, and not to establish facts, from which, taken in connection with the language of the will, that intention would necessarily be inferred.

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THE MASTER OF THE ROLLS:

The question in cases of this sort is a question of intention. *Primâ facie*, the term "children" is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, no illegitimate child can take under the description of children. If, in this case, there had been no legitimate child of Mary Gladman at the time of making the will, and there had been two illegitimate children, inasmuch as the death of Mary Gladman made it

† 16 R. R. 193 (2 Mer. 419).

§ 3 Anst. 684.

‡ 12 R. R. 255, 266 (1 V. & B. 422,

|| 12 R. R. 269 (1 V. & B. 469).

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impossible that there should be any future legitimate child, there can be no doubt *that evidence would have been admissible to prove the fact; and the two children, who had acquired the reputation of being the children of Mary Gladman, would have taken under the description of her children by force of the clear intention of the testatrix. If, in this case, the gift had been “to the two children” of Mary Gladman deceased, then, inasmuch as the death of Mary Gladman had made it impossible that there should be two legitimate children, ought not evidence to be admissible of the facts from which it was demonstrated that the testatrix meant to include the illegitimate child who had acquired the reputation of being the child of Mary Gladman? And is there, as to this point, any sound and rational distinction between the expression “the children,” which necessarily describes more than one child, and the expression “the two children?”

Considering, then, that “children” is an ambiguous term, which may mean legitimate child or illegitimate children who have acquired the reputation of being children; and assuming that if there are, or by any possibility may be, legitimate children to satisfy the expression, no illegitimate child can take together with the legitimate children, although that point is denied by the judges in *Wilkinson v. Adam*, I think the evidence admissible in this case: and the evidence, being admitted, demonstrates that the testatrix did mean to include the defendant Charlotte Shelley under the expression of “the children of the late Mary Gladman.”

[*343] In the case of *Swaine v. Kennerley*,† the expression is, “the child or children of my late son Thomas Swaine, deceased,” which implied a doubt in the mind of the testator whether his late son had more than one child. In *Hart v. Durand*,‡ the expression is, “to every of the sons and daughters of my late cousin J. Durand;” and, *that cousin having left only one legitimate daughter, and only two illegitimate children, a son and a daughter, the expression in the will manifested that the testator was ignorant of the actual state of Durand’s family. Neither of these cases, therefore, demonstrated a clear intention on the part of the testator in favour of the legitimate children.§

† 12 R. R. 269 (1 V. & B. 469).
 3 Anst. 684.

§ See *Bagley v. Mollard*, 32 R. R. 231 (1 R. & M. 581).

DOWLING v. TYRELL.†

(2 Russ. & Mylne, 343.)

Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator.

1831.
Feb. 14.

Rolls Court.
LEACH, M.R.
[343]

In this case the testator gave a legacy to an infant described in the will as his natural child, with a direction to apply the interest for his maintenance, during his minority.

A question was made, whether the interest was payable on the legacy from the death of the testator, or from the end of the year after his death.

The cases cited [as to natural children] were *Beckford v. Tobin*,‡ *Newman v. Bateson*.§

The MASTER OF THE ROLLS ruled that interest was payable from the death of the testator.

RICHARDS v. DAVIES.||

(2 Russ. & Mylne, 347—352.)

Where a plaintiff partner is excluded from ascertaining the partnership accounts the Court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution.

1831.
Feb. 15.

Rolls Court
LEACH, M.R.
[347]

By articles of agreement, dated the 19th of January, 1799, a partnership was constituted for a long term of years, which had not yet expired. Under these articles the plaintiffs were interested in the partnership; but they had not interfered actively in the business, which was managed by the defendant Thomas Davies. The plaintiffs alleged that proper accounts of the partnership dealings had not been rendered to them from time to time, and that they were excluded from the means of ascertaining the state of the partnership affairs. They, therefore, filed their bill in the Court of Great Sessions for the counties of Carmarthen, Pembroke, and Cardigan, praying that an account of the

† *In Re Richards* (1869) L. R. 3 § 19 R. R. 286 (3 Swanst. 689).
Eq. 119. || *Fairthorne v. Weston* (1844) 3 Ha.
‡ 1 Ves. Sen. 308. 387, 391.

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partnership dealings might be taken, and that the partnership might be conducted and carried on during the residue of the term, for which the same was established, in conformity to the articles *of agreement of the 19th of January, 1799; that Thomas Davies might be decreed, from time to time, to produce to the plaintiffs, and to permit them to have access to, all the books of the partnership; and that if necessary, a proper person might be appointed to manage and conduct the partnership trade, and to receive the debts due and to become due to the same.

The answer suggested that the accounts of all dealings prior to the filing of the bill had been settled; but there was no evidence of the alleged settlements.

The cause came on to be heard in the Court of Great Sessions, shortly before the Act abolishing the Welch judicature came into operation; and the suit was dismissed with costs, on the ground that a partner could not file a bill to have the accounts of a partnership taken, unless he prayed the dissolution of the partnership.

The cause was removed by the plaintiffs into the Court of Chancery, pursuant to the provisions of 11 Geo. IV. & 1 Will. IV. c. 70; and a petition of re-hearing was presented, which now came on to be argued.

Mr. Bickersteth and *Mr. John Wilson*, for the plaintiffs [cited *Harrison v. Armitage*,† *Forman v. Homfray*†].

Mr. Pemberton, *contra* [cited *Waters v. Taylor*§].

[351] THE MASTER OF THE ROLLS :

A bill was filed in the Court of Great Sessions of the several counties of Carmarthen, Pembroke, and Cardigan by one partner against another, praying for an account of what was due to the plaintiffs in respect of the past partnership transactions, and that the partnership might be carried on and conducted under the decree of the Court.

† 20 R. R. 284 (4 Madd. 143).

‡ 13 R. R. 115 (2 V. & B. 329).

§ 13 R. R. 91 (15 Ves. 10, 2 V. & B. 299).

At the hearing of the cause in Wales, the bill was dismissed with costs.

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r.
DAVIES.

The plaintiffs, under the statute of 11 Geo. IV. & 1 Will. IV. c. 70, presented a petition of rehearing.

In support of the judgment in the Court below it is contended, that a court of equity cannot entertain a suit for a partnership account, unless the bill seeks a dissolution of the partnership.

The plaintiff, for monies due to him on a partnership account, has no relief at law, and if a court of equity refuses him relief, he is wholly without remedy. This would be contrary to the plain principles of justice, and cannot be the doctrine of equity.

It is objected, that if such a suit be entertained, the defendant may be vexed by a new bill, whenever new profits accrue; but what right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff?† Would not *the same objection lie in a suit for tithes, which accrue *de anno in annum*!

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I must, therefore, decree the account of the past partnership transactions; but I can make no order for carrying on the partnership concerns, unless with a view to a dissolution.

MAJOR v. LANSLEY.

(2 Russ. & Mylne, 355—359; S. C. 9 L. J. Ch. 102.)

A married woman, to whom a rent-charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration: she is bound by that assignment after the death of her husband.

1831.
Jan. 24, 27,
31.

Feb. 25.

Rolls Court.
LEACH, M.R.
[355]

[THE law upon this point being settled,† it will be sufficient to preserve the following note of the judgment:]

THE MASTER OF THE ROLLS :

The defendant, being a *feme covert* entitled for life to her separate use to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning the annuity by deed to the plaintiff. The husband having died a few months

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† *Contra*, see per Alderson, B., † See *Sturgis v. Corp*, 9 R. R. 169
Knebell v. White (1836) 2 Y. & C. (13 Ves. 190).
EX., p. 21.

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LANSLEY.

after this reversionary interest fell into possession, the plaintiff's title to the annuity was disputed by the wife, upon the ground that by the death of the husband the legal interest in the annuity became vested in her, and had not passed to the plaintiff, no fine having been levied by her.

The wife, at the time of the assignment, had an equitable interest in the annuity or rent charge for her life to her separate use, and the legal interest was then in the husband for the joint lives of himself and his wife; and, in the consideration of a court of equity, the subsequent accession of the legal interest to the wife by the death of the husband cannot defeat the effect of the equitable assignment of her beneficial interest, which she had before made for a full and valuable consideration.

1831.
Nov. 25.
Dec. 24.

ELIZABETH DONNE v. REUBEN HART.†

(2 Russ. & Mylne, 360—364; 1 L. J. (N. S.) Ch. 57.)

LEACH, M.R.
[360]

The contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by the sale, though the husband dies before the contingency is determined or the reversion falls into possession.

WILLIAM HANNAM deceased, by his will dated the 17th of October, 1792, bequeathed to trustees, among other things, a leasehold for years, upon trust for his son Thomas Hannam for his life, and after his decease, upon trust for all and every the children of Thomas whom he should leave at the time of his decease, their executors, administrators, and assigns, in equal shares and proportions. The testator also bequeathed unto the same trustees another leasehold for years, upon trust for his wife during her life, and after her decease, for his son the said Thomas Hannam during his life, and after his decease, for all and every the children of his son Thomas, which he should have at the time of his decease, their executors, administrators, and assigns, in equal shares and proportions.

The testator died in the year 1794; and his widow shortly afterwards. The son Thomas had several children, one of whom,

† *In re Bellamy* (1833) 25 Ch. D. 620, 53 L. J. Ch. 174, 49 L. T. 708.

Elizabeth, intermarried, in the year 1810, with Theophilus Henry Donne.

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v.
HART.

By an indenture of assignment, bearing date the 20th of August, 1812, and made between Theophilus Henry Donne and Elizabeth his wife of the one part, and Reuben Hart of the other part, reciting that Donne and his *wife had contracted with Hart for the sale to him of all their right and interest in and to the messuages, tenements, stocks, funds, and securities for money bequeathed by the will of William Hannam, for the price or sum of 150*l.*, it was witnessed that, in consideration of 55*l.* paid by Hart to Donne and his wife, and of the further sum of 95*l.* covenanted to be paid within a year after the death of Thomas Hannam by Hart to Donne and his wife, Donne and his wife and each of them granted and assigned unto Hart, his executors, administrators, and assigns, all their estate, right, and interest, shares and proportions in all the leasehold premises bequeathed by the will of the testator, to hold the same to Hart, his executors, administrators, and assigns, for the residue of the terms respectively to come therein; subject nevertheless to the life estate of Thomas Hannam therein.

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Theophilus Henry Donne died in the year 1823; Thomas Hannam died in the year 1830, leaving five children him surviving.

In Hilary Term, 1831, Elizabeth, the widow of Donne, filed a bill against Hart, insisting that the assignment of the leasehold premises was not operative as against her.

Mr. Pemberton and *Mr. Bligh*, for the plaintiff, * * argued that the same principle, which applied to reversionary interests in personal chattels, extended to a contingent reversionary interest in the trust of a term.

Mr. Phillimore, *contra* [cited passages from Coke† and other old authorities shewing that] the assignment of the husband passes the whole of the wife's interest in a term, whether her interest be immediate and vested, or contingent and reversionary

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† Co. Litt. 46 b; Co. Litt. 351 a.

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[except in those cases where the interest depends upon a contingency which cannot possibly happen during the husband's lifetime].

Mr. Pemberton, in reply.

Dec. 24.

THE MASTER OF THE ROLLS:

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In this case William Hannam by his will gave a term of years, to which he was entitled in certain houses, to trustees, upon trust for his son Thomas, during his life, and after the death of Thomas, for such child or children as he should leave at his decease. Thomas had, among other children, a daughter, who is the plaintiff, and who, during the life of her father, intermarried with Theophilus Henry Donne. Donne, and the plaintiff his wife, in the lifetime of her father, assigned her contingent interest in this term of years to the defendant, for a valuable consideration. Donne died, leaving the father him surviving; and, the father being now dead, the plaintiff claims this term, upon the ground that the assignment to the defendant was void.

It is clear that the wife's contingent legal interest in a term may be sold by the husband; and there is no difference in equity between the legal interests in and the trusts of a term.

1831.
July 19, 26.

CAMPBELL *v.* HARDING.

(2 Russ. & Mylne, 390—416.)

Lord
BROUGHAM,
L.C.

[THIS case was affirmed on appeal by the House of Lords as reported under the name of *Candy v. Campbell*, in 2 Cl. & Fin. 421, and in 8 Bligh (N. S.) 469.]

MALCOLM *v.* TAYLOR.†

(2 Russ. & Mylne, 416—448.)

Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

MARTHA TAYLOR, spinster, being seised in fee of an interest in a moiety of the Lysons Plantation, in the island of Jamaica, with the slaves and stock thereupon, and being also possessed of a large personal estate, by her will, which was duly executed and attested, after giving divers legacies to her mother Dame Elizabeth Goodin Taylor, her sisters Anna Susanna Watson Taylor and Maria Taylor, and to other persons [including a legacy of 2,000*l.* to her cousin Mary Ann Martha Malcolm, which is stated to have lapsed by her death under 21 and unmarried, and the will] continued thus: "And I give, devise, and bequeath my share or portion, right and interest of and in the moiety of Lysons Plantation or estate in the island of Jamaica, and the slaves, cattle, and stock thereupon and thereunto belonging, and also all the residue and remainder of my money in the funds, after payment of the annuities and legacies herein-before bequeathed, and also all *my plate, books, and the portraits of my father, brother, and uncle Simon Taylor, unto and to the use of the said E. G. Taylor and Maria Taylor, and their respective assigns for the terms of their natural lives, share and share alike, and after the death of either of them then unto the survivor of them and her assigns for her life: and I will and direct that the estate, share, and proportion of the said Maria Taylor shall be for her own sole use and benefit, separate and apart from any husband she may hereafter marry; and her receipts alone to be sufficient discharges for the produce, profits, interest, or dividends thereof; and after the decease of the survivor of them, the said E. G. Taylor and Maria Taylor, unto such of the children of the said Maria Taylor as she shall by

1831.
June 23.
July 5, 8, 19.

Rolls Court.
LEACH, M.R.
On Appeal.
Dec. 20, 21.
1832.
Mar. 10.

Lord
BROUGHAM,
L.C.
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† *Bowen v. Lewis* (1884) L. R. 9 App. Cas. 890, 900, 54 L. J. Q. B. 55, 52 L. T. 189.

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any deed in her lifetime, or by her last will and testament duly executed and attested in the presence of three or more witnesses, direct or appoint; and in default of such direction or appointment, and as far as the same shall not extend, then I will and direct that my said share or portion of the moiety of Lysons Estate and the said residue of my money in the funds shall be equally divided between and among the said children, share and share alike, their heirs and assigns, and if but one such child, then the whole to such one child, his or her heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons, at twenty-one, and being daughters, at twenty-one or marriage: and in case the said Maria Taylor shall die without issue of her body lawfully begotten, then I give, devise, and bequeath, after the decease of the survivor of them, the said E. G. Taylor and Maria Taylor, my said portion of the moiety of the Lysons Estate unto and among all and every the children of the said Anna Susanna Watson Taylor and to their heirs and assigns, equally to be divided between them, share and share *alike; and in case the said Maria Taylor shall die without issue as aforesaid, I then give and bequeath (after the death of the said E. G. Taylor and Maria Taylor) the said residue of my money in the funds, and all my said plate, books, and portraits of my father, brother, and uncle, unto the said John Malcolm and his assigns for his life; and after his decease, I give and bequeath the same to his eldest son for ever. But in case the said John Malcolm shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, plate, books, and portraits unto the said Mary Ann Martha Malcolm absolutely: but the said plate, books, and portraits shall after her decease go to her eldest and other sons or children in succession, so far as the rules of law and equity will permit, by way or in nature of heirlooms; yet nevertheless so that the same shall not vest absolutely in any person or persons, until he, she, or they respectively shall attain or have attained the age of twenty-one years, or dying under that age, shall leave issue of his, her, or their body or respective bodies. And all the rest, residue, and remainder of my estate and effects, real, personal, and mixed, I give, devise, and bequeath unto the

said Elizabeth Goodin Taylor and Maria Taylor, their heirs, executors, administrators, and assigns, equally to be divided between them, share and share alike: and I nominate, constitute, and appoint the said E. G. Taylor and Maria Taylor joint executrixes of this my last will and testament."

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TAYLOR.

The testatrix died in the year 1817. Maria Taylor survived Elizabeth Goodin Taylor, and died without having ever been married. Mary Ann Martha Malcolm died in the year 1828, under age, and unmarried. The present bill was filed by John Malcolm, who had come of age, but had not married, against Anna Susanna *Watson Taylor, and her husband, Mr. Watson Taylor, as representing the estates of the testatrix, and of Elizabeth Goodin Taylor and Martha Taylor, and against all other parties claiming interests under the will.

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The main question in the cause was, whether, in the events which had happened, the plaintiff was entitled to the residue of the testatrix's money in the funds, and to the plate, books and portraits; and if he was, whether he took an absolute interest, or a life estate only, in these two several descriptions of property. For the plaintiff it was argued, that the word issue was to be understood in a restricted sense, as meaning children; or that it was to be intended as issue living at the death of Maria Taylor.

The defendant, Mrs. Watson Taylor, claimed to be entitled to the property, upon the ground, that by the dying without issue, the testatrix contemplated a general failure of issue of Maria Taylor, and that the limitation over to the plaintiff in that event was too remote. The same questions were also raised in a cross-suit of *Taylor v. Malcolm*, which was brought on for hearing together with the original suit.

The case was very fully argued by *Mr. Bickersteth*, *Mr. Miller*, and *Mr. Hodgkin*, for the plaintiff; and by *Mr. Pemberton*, *Mr. Spence*, *Mr. Preston*, *Mr. J. B. Parry*, and *Mr. W. Russell*, for the different defendants.

THE MASTER OF THE ROLLS:

July 5.

As applied to the real estate, the expression "dying without issue" is to be construed a dying without having had issue, because, as a child of Maria Taylor would take a vested interest

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upon its birth, the limitation *over can have no other object than to provide for the failure of children.

With respect to the funded property, a child of Maria Taylor would not take a vested interest at its birth; nor until, being a son, it attained twenty-one, or, being a daughter, it attained twenty-one or married; and the expression "dying without issue" cannot, as to this property, be construed a dying without having had issue, because, although Maria Taylor had a child born, the limitation over might still take effect by the death of such child before it attained twenty-one, being a son, or, being a daughter, before it attained twenty-one, or married. Neither can the expression be construed a dying without issue living at the death, because, although a child of Maria Taylor were living at her death, the limitation over might yet take effect by the death of the child before it acquired a vested interest. The expression "dying without issue," as applied to the funded property, must, therefore, either mean a dying without such issue as would take by force of the prior limitation, or a general failure of issue. It is a reasonable intendment, that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This is the plain intention of the testatrix with respect to the real estate; and it is to be supposed, where real and personal estate are given together, that the testatrix had the same intention with respect to the funded property and the real estate. The objection to this construction is, that if a son married and died under twenty-one, leaving a child, such child would take nothing; and I agree that it is probable, that if the possibility of such an event had occurred to the testatrix she would have provided for it; and the inquiry then is, whether the testatrix used the words "dying without issue" in order to provide for *that event, or whether, that event not being in her contemplation, she could not mean to provide for it.

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It is reasonable to infer that if she had contemplated that event, she would have provided for it in express terms by vesting the property in sons on their marriage, as she has done in the case of daughters. It appears to me, that the true answer to the objection is, that it not being usual for sons to marry under twenty-one, the testatrix did not contemplate, and her will has

not provided for that event; but it being usual for daughters to marry under twenty-one, the testatrix therefore contemplated and has provided for that event. Upon the whole, therefore, as to the funded property, I am of opinion that I shall best advance the expressed intention of the testatrix by holding the limitation over to mean, not a general failure of issue, but a failure of the children for whom the prior gift was intended.

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TAYLOR.

With respect to the plate, books, and portraits, it is manifestly a gift to Maria Taylor for life, with a remainder over on her dying without issue; and there is no intermediate gift. This is either too remote as meaning an indefinite failure of issue, or is an estate tail by implication in Maria Taylor; and in either case the plate, books, &c. belong to Mrs. Watson Taylor.

* * * 1845 * *

By the decree it was, among other things, declared, that according to the true construction of the will of the testatrix, the plaintiff, John Malcolm, upon the death of Maria Taylor, became entitled for his life to all the residue and remainder of the testatrix's money in the funds after payment of the legacies and annuities thereby bequeathed; * * and that the plate, books, and portraits therein mentioned, became and were the absolute property of the said Maria Taylor, and that the same now belonged to the defendants, her legal personal representatives. * * *

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The plaintiff and the defendants presented cross-petitions of appeal against his Honor's decree. Dec. 20, 21.

Sir E. Sugden, Mr. Knight, Mr. Miller, and Mr. Hodgkin, for the plaintiff John Malcolm. * * *

Mr. Pepys, Mr. Spence, Mr. Preston, Mr. J. B. Parry, and Mr. W. Russell, for the different defendants. * * * [431]

The principal cases cited by counsel are referred to in the following judgment:]

THE LORD CHANCELLOR :

Four questions are raised upon this will; first, whether the residue of the money in funds (said to amount to 70,000*l.*) is given to Maria Taylor absolutely, *or only for her life; in other words, whether or not the gift over of that residue to John

1832.
March 10.

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TAYLOR.

Malcolm is good: secondly, whether the plate, books, and portraits are given absolutely to Maria Taylor, or only for her life, and then over to John Malcolm: thirdly, whether John Malcolm, if he takes either or both stock and plate, takes them absolutely, or only for his life: and fourthly, whether the lapsed legacy of 2,000*l.* given to Mary Ann Martha Malcolm belongs to the residue of the stock, or to the general personal estate.†

Of these questions the most important, in my view, is the first; but the others, and especially the third, are also of considerable moment, with reference both to the amount of the interests involved, and the nicety of the arguments applied to it, the point being one by no means free from difficulty.

With a view to the first three questions, but especially the first, it is necessary to examine the scheme and structure of the will, from the first mention of the residuary fund under consideration. [The LORD CHANCELLOR read from the will the clauses of gift to Maria Taylor and her children, and proceeded:]

Here it is observable, that the plantation, funded property, and plate, are all blended together during the earlier part of the provisions; they are all then included in the gift to the first takers, Elizabeth and Maria; all three in the gift to the survivors; all three in the gift to Maria Taylor's sole and separate use (the clause making her receipt a discharge being "for produce, profits, interest, or dividends," words applying to all the descriptions of property); all three in the power of appointing to her children: and it is only when we come to the fifth provision that the plate is dropped, *and in default of her appointment, the plantation and stock, without the plate, are dealt with. Both are given to Maria Taylor's children, share and share alike, their heirs and assigns; and if but one, the whole to that one, his heirs and assigns. Then comes a provision which does not extend to the plantation. This provision, confined as it is to the stock, is of much importance; for it postpones the vesting of an interest in it to the age of twenty-one in the case of sons, and twenty-one or marriage in the case of daughters; whereas the

† The fourth question is not included in this report. The statement of the will in the original

report does not explain how the question arose.—O. A. S.

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interest in the plantation is allowed to vest in the children, both sons and daughters, at their births. The words are quite clear and express. In these circumstances no question is made upon the devise of the plantation. His Honor held, that it was given to Maria Taylor for life, with a power of appointing to her children, and in default of appointment, to her children, share and share alike, in fee; and if she have no children, then to Mrs. Watson Taylor's children; and it is clear, that if Maria Taylor had children, their interest vested at their birth. That the legacy of the stock did not vest, but was contingent, is equally clear.

We come now to the gift over of the stock, and every thing turns upon the reference made in that gift: "And in case Maria Taylor shall die without issue as aforesaid, I then give and bequeath, after the death of the said E. G. Taylor and Maria Taylor, the said residue of my money in the funds, and all my said plate, books, and portraits, &c., unto the said John Malcolm, and his assigns, for his life; and after his decease, I give and bequeath the same to his eldest son for ever."

Suppose the clause had stood "without issue" alone, and the words "as aforesaid" had not been added, it might have been argued that this either meant a general *failure of issue, or a failure of such issue as last mentioned, namely, the issue to take the plantation; the gift over of the plantation being the last antecedent. In that case, such an argument might have been more easily maintained than it can when the words are followed by the expression "as aforesaid;" yet even standing alone, they could not, without difficulty, have this latter sense imposed upon them, namely, of reference to the last antecedent; for the children are to take the plantation at their birth, and they are only to take the stock (being the subject of the gift over now under consideration) at twenty-one, or at twenty-one or marriage.

The words "as aforesaid," however, plainly refer further back, and aid us in assigning its true construction to the gift over.

In the first place, the natural use of these words points not to the immediately preceding clause, but to one more remote; they do not mean "last aforesaid." To convey that sense the phrase would have been simply "without such issue," or "without issue as last aforesaid." The expression "without issue as

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aforesaid" points to some preceding provision. Next consider what the testatrix is dealing with in this gift over. It is the stock; the plate also, I admit, and that raises some doubt; but certainly not the plantation. Now the stock was not in any way the subject of the immediately preceding bequest, but it was the subject of the one before.

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Had this gift over stood immediately after the clause providing for a default of appointment to the stock, and postponing the vesting of it, and had it so stood, without the addition of "as aforesaid," there could have been no doubt whatever, that the words "without issue" must have been held to mean such issue as is *referred to in the preceding clause, touching the appointment and vesting. This is plain from the case of *Target v. Gaunt*,† and in a great degree also from *Goodright v. Dunham*.‡ In the former, a term being given to A. for life, with remainder to such of his issue as he should appoint, and if he died without issue, remainder to B., Lord MACCLESFIELD held that issue in the gift over meant such issue as A. might appoint to under the preceding limitation, and that the executory bequest to B. was good. In *Goodright v. Dunham*, where the devise was to A. for life, and after his death to his children equally and their heirs, and in case he dies without issue, over, Lord MANSFIELD held "in case he dies without issue," to mean "in case he dies without children;" because, he said, the gift over was tacked to the preceding clause.

Then does the mere separation of the gift over from the provision respecting the stock, prevent this reference? Are not the identity of the subject-matter, namely, the stock, and the words of reference, viz., "as aforesaid," sufficient, if not singly, yet taken together, to establish the connection between the gift over and the preceding provisions? The cases, such as *Salkeld v. Vernon*,§ *Doe v. Lyde*,|| *Rex v. Marquis of Stafford*,¶ where issue has, in similar circumstances, been held to be a word of purchase, need not be referred to, or more than mentioned. In all of them the word issue was held to mean the children before referred to, —to lose the character given it by Lord HALE in *King v.*

† 1 P. Wms. 432.

‡ Doug. 264.

§ Eden, 64.

|| 1 T. R. 593.

¶ 8 R. R. 668 (7 East, 521).

Melling,† of being *nomen collectivum* of itself, and to assume that individuality which belongs to “children,” a *word that may be *nomen collectivum*, but only, as the same great authority has said, by being made so, and, as it were, against its natural sense.

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It is no doubt true, that to the construction here given it may be objected, that the plate is found to be covered by the words of the gift over, as well as the stock; and that the previous clause, to which one construction makes the gift over bear reference, comprehends the plantation as well as the stock. Of the former objection it may suffice to dispose when we come to the second question, which relates to the plate; and to the latter it seems a satisfactory answer, that although the plantation is dealt with in the former clause, yet so is the stock, the subject of the gift over, and that the stock is dealt with in a way wholly different from the plantation.

Again, the will, those parts of it at least under consideration all plainly look to children throughout, and provide for them. The scheme of the disposition is, generally speaking, to give to Mrs. Watson Taylor's family the plantation, and to John Malcolm the money in the funds, after Maria Taylor and her children.

No doubt, the manner in which this intention is to be made effectual in John Malcolm's favour, brings him in before the grand-children of the first taker (Maria Taylor) in the event of her children dying under age. But that does less violence to the general intent than giving to Maria Taylor an absolute interest in the money, and leaving out John Malcolm altogether. The objection, too, applies to the case of sons only, and not daughters; for the interest of daughters vests on their marriage; and the event of a son dying under age, and leaving children, is rarely contemplated in such arrangements. *This is shewn by the fact, that the ordinary form of bequest, which is the one here used, does not provide for the vesting of an interest in sons upon their marriage. At all events, the violence apprehended is infinitely less when the possible exclusion is not that of the giver's own grand-children, but merely of the grand-children of a collateral, the first taker; and yet a construction exposed to this possibility is constantly adopted, even where the testator's own direct descendants may by possibility be the victims of it.

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† 1 Vent. 531.

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Upon the whole, therefore, I am of opinion that the gift over of the stock to John Malcolm is good, and that Maria Taylor did not take an absolute interest in it.

Secondly; does the plate fall within the same rule and go over to John Malcolm, or did Maria Taylor take an absolute interest in it?

It is first given with the plantation and the stock to Elizabeth and Maria and the survivor for life, and after the survivor's decease, to Maria's children, as she may appoint. Here the plate is dropped, and no provision with regard to it is made in the event of Maria Taylor failing to exercise her power of appointment. So that in this first portion of the will there is no dealing with the plate to which, in construing the subsequent gift over, the words, "without issue as aforesaid," can be referred back. If, then, the construction as to the stock be a sound one, which refers those words to such issue as had been mentioned when dealing with the same fund in the former clause, and not to the issue mentioned when dealing with the plantation, by parity of reason, all reference back must be excluded in construing the same words as to the plate; inasmuch as there is nothing before mentioned touching the plate, in *connexion with the children, or with anything to which issue can refer. The plate then will be given over on a general failure of issue; and whether from the gift being too remote, or from the gift to her being what, in the case of realty, would be an estate tail—it is indifferent which—Maria Taylor takes absolutely, and consequently the interest in this part of the property now vests in her personal representatives.

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Thirdly; does John Malcolm take an absolute interest, or only for his life, in the part which goes over to him, that is, in the stock? That "son" may be a word of limitation is not denied; but there must be some plain reason for making it so. None of the cases from *Byfield's* case† downwards, certainly not *Robinson v. Robinson*,‡ come at all near the violence which it would be doing to the obvious meaning of this clause to construe "eldest son" as *nomen collectivum*. As to the superadded words "for ever," they clearly are only used to contradistinguish the interest which the eldest son of John Malcolm was to take, from that which John Malcolm himself was to take; the one for life, the other absolutely.

† Cited 1 Vent. 231.

‡ 1 Burr. 38.

But the gift over is said to raise a different construction : “ In case the said John Malcolm shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, &c. unto the said Mary Ann Martha Malcolm.”

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Supposing then that reading the gift over in the conjunctive (“and,” instead of “or,”) would have the effect of giving an estate tail to John Malcolm, if the property were real estate—a point which is disputed ; and that, the property being personal, it would give the absolute interest to John Malcolm, we have here only a choice of *difficulties, as is but too frequent in such cases. If the clause is read conjunctively, then, by the supposition, John Malcolm would take an absolute interest to the exclusion of his son, to whom an absolute interest had just before been limited upon the determination of the life interest which was alone given expressly to John Malcolm. If, on the other hand, it is read in the disjunctive, though the son’s interest may be defeated by the father dying under age, and yet leaving issue, viz., that son, in which case it would go over ; yet that is only a possibility, whereas the other is a certainty ; and it is, moreover, a possibility not contemplated in the ordinary case of such limitations, as I observed upon the first point, and not contemplated by this testatrix in the former part of the will, where she is disposing of this very same fund, or, at least, of what constitutes the bulk of it, the stock. It is fit that, in making our election between these difficulties, we keep in view the plain intention expressed of giving to John Malcolm a life interest, and to the eldest son, as a purchaser, an absolute interest expectant upon the determination of the former ; and though we are not at liberty to reject the words which follow, for any apparent inconsistency with this intention, yet if there are two ways of reading them, one of which only frustrates the intention by a remote possibility, we should choose that rather than one calculated to operate a certainty of exclusion, more especially when such a possibility appears not to have been in the contemplation of the maker of the instrument.

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It must, however, be admitted that the reading of “or” instead of “and” is rarely to be found sanctioned by decision. *Maberly v. Strode*† and one or two other cases of the same kind

† 4 R. R. 61 (3 Ves. 450).

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may be reckoned for nothing, because *the words would have been hardly sensible if read in any other way. That was a limitation to A. for life, and after his death to his children, but in case he died unmarried *and* without issue, over : if he died unmarried, he must, in contemplation of law, have died without issue. But in *Brownsword v. Edwards*,† Lord HARDWICKE read “and” as “or,” to effectuate the intention appearing on the will. The devise there was to trustees to receive the rents till A. should attain twenty-one or have issue, and then to A. and the heirs of his body, but if he died before twenty-one and without issue, then in trust for B., his sister. A. died after twenty-one and without issue ; and Lord HARDWICKE supported the gift over to the sister by reading and as or. It has been said, and perhaps truly, that Lord HARDWICKE would have felt much more repugnance to giving the words this construction, had any other event happened. And the Court of King’s Bench has certainly gone against, though they cannot be said to have overruled his decision in *Doe v. Jessep*.‡

The reason given by Lord ELLENBOROUGH for questioning the case of *Brownsword v. Edwards*, that in a will words are to be taken in their natural sense, is one which all must heartily wish could always be applied and taken as a general canon. But unfortunately it is too late ; rules of technical construction are no longer to be rejected even in the case of wills ; and the utmost that can now be done is to follow the natural sense of the words used in such instruments wherever those rules will permit us. It may be, I trust it certainly is, going much too far to say, with one of the learned counsel, that no conveyancer can give a safe opinion upon any one case on the law of real property which comes before him in the twenty-four hours.

[*448] Nevertheless it cannot *be denied that much uncertainty has been introduced into this branch of the law. This is not, however, to be imputed solely to the adoption of technical rules. It has been in part owing to not keeping by the technical rules once introduced. The struggles in favour of intention, sometimes made on the ground of natural meaning, sometimes on the ground of other rules as technical as those striven against,

† 2 Ves. Sen 243.

‡ 11 R. R. 380 (12 East, 288).

have been a fruitful source of this uncertainty, and in more instances than one a recurrence to the original technical principle has been seen to sweep away a multitude of intermediate decisions, while the new decisions are found to leave unsettled almost as much as they have fixed.

Against the construction now given to this part of the will it is needless to say that objections may be raised from cases which may be put, in which a result would take place most unlike any the testatrix could have thought of. But that is not peculiar to this case; it may be said to happen, and almost of necessity, in every instance where a gift over is frustrated by being limited on a general failure of issue. Upon the whole I do not differ with his Honor in his construction of the gift to John Malcolm, holding that he takes a life interest only in the testatrix's money in the funds.

The result is that, upon all the four points, the judgment of the MASTER OF THE ROLLS must be affirmed.

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GARRARD v. LORD LAUDERDALE.

(2 Russ. & Mylne, 452—456.)

[For the report of this appeal see 30 R. R. 105, where the report of the case below is given from 3 Simons, p. 1.]

1831.
Jan. 27, 29,
Feb. 11.

Lord
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ATTORNEY-GENERAL v. THE ARCHBISHOP OF YORK.

(2 Russ. & Mylne, 461—469.)

Reference to settle a scheme for the application of the revenues of an ancient hospital, of which the original foundation and endowment were unknown, but of which the master, after paying a certain fixed yearly stipend to a chaplain, and also to six alms-women who had apartments in the hospital, and defraying the repairs, applied the surplus income to his own use.

1831.
March 5.
SHADWELL,
V.-C.

On Appeal.
Lord
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THIS was an information filed by the *Attorney-General*, without a relator, and proceeding upon the certificate of the charity commissioners under the provisions of the 59 Geo. III. c. 81. The defendants were the Archbishop of York, the Dean of Rippon, and

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the corporation of the master, brethren, and sisters of the Hospital of St. Mary Magdalen, at Rippon.

The information stated, that, in the early part of the twelfth century, Thurstan, then Archbishop of York, founded an hospital, called the Hospital of St. Mary Magdalen at Rippon, for the relief and support of sick indigent persons, and that the hospital became seised of very considerable real estates; that the original institution consisted of a master and chaplain, brethren and sisters, who many years ago were incorporated under the name of the master, brethren, and sisters of the Hospital of St. Mary Magdalen at Rippon; that the particulars of the foundation, or the time of the incorporation, could not now be discovered; that within the last two centuries the establishment had at different times considerably varied, but that for many years past there had been no brethren upon the foundation, and that the present establishment consisted of a master, chaplain, and six sisters; that the master, brethren, and sisters, had been for many years past seised of the lands and hereditaments in the information particularly mentioned; that, by the will of one William Spink, a sum of 7*l.*, yearly charged and payable as therein *mentioned, was given for the benefit of the said six sisters and chaplain of the said hospital; and that there were also other sums now remaining in the hands of the defendant, the present master of the hospital, which formed part of the funds of the hospital, and were applicable to the purposes thereof. The information then stated, that the right of appointing the master had, for a long series of years, been exercised by the Archbishop of York for the time being, and that such appointment, ever since the establishment of the Collegiate Church of Rippon, in the year 1606, had been uniformly made by the Archbishop in favour of the dean of the said church for the time being, as an augmentation to the revenues of the deanery, which were of small amount: that in the year 1792, the mastership of the hospital was accordingly given to the defendant Waddilove, the Dean of Rippon, who had ever since been, and still was, the master: that the chaplain and sisters had been from time to time appointed by the master for the time being; and that the sisters were poor persons selected by him as fit objects of charity, and that one of them at present received

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parochial relief: that the principal part of the estates of the hospital had been, for above two centuries past, granted out upon leases for lives, at certain small rents, which had never been raised, but that the leases had been from time to time renewed on payment of fines; and that such leases had been always granted in the name of the master, brethren, and sisters of the hospital, and under their common seal, although the same had for many years been granted by the master for the time being at his own discretion: that the actual value of the property belonging to the hospital amounted to the sum of 464*l.* annually, and that there was also some valuable timber on the estates: that the master had paid the expense of keeping the buildings of the hospital in *repair, and also 10*s.* a year to the receiver of the rents, and divided a sum of 10*l.* yearly among the five elder sisters of the hospital equally; and that subject to such payments, he had applied to his own use the whole of the rents and profits of the charity estates, including the fines upon renewals, except the rent of a small field adjoining the hospital, let for the sum of 2*l.* 5*s.* a year, which sum was equally divided among the five elder sisters; and that the six sisters had also the use of the apartments in the hospital, and of the produce of the garden.

The information charged that the same proportion of the rents, namely, a sum of 10*l.* per annum, was applied to the use of the sisters of the hospital, at a period when the present reserved rents were the full annual value of the property; and that as such value had increased, and had been received in the shape of fines upon renewals, a proportionate increase ought to have been made in the stipends of the sisters, and some allowance ought to be made for the chaplain. The information then submitted that the present appropriation of the charity funds was inconsistent with the purposes of the foundation, as far as the same could be discovered; and, after stating as a pretence that the defendant, the Archbishop of York, alleged that, by virtue of his office, he was the special visitor of the hospital appointed by the founder, and that the Court, therefore, had no jurisdiction over the same, it charged that the hospital had no special visitor appointed by the founder, and that no right of visitation had ever been exercised either by the Archbishop or his predecessors; and it prayed

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an account of the charity estates and a reference to the Master to settle a scheme for the application and distribution of the rents and profits in future.

The several defendants put in answers, admitting the facts stated in the information. The defendant, the Archbishop of York, by his answer, stated his belief that the Archbishop of York for the time being had always had the appointment of the master, and that the master on his election always took an oath to the Archbishop, of obedience to him and his successors. He admitted that he had never exercised any visitatorial power.

The answer of the defendant, the Dean of Rippon, who was also master of the hospital, denied that the present application of the charity funds was inconsistent with the purposes of the foundation as far as the same could be discovered, or that any directions ought to be given by the Court for the regulation of the charity and the future application of its revenues; for the defendant submitted that the present mode of distributing the revenues having been sanctioned by such long usage, ought not now to be disturbed; and, at all events, that the hospital was to be considered as an ancient ecclesiastical endowment, in the patronage, and subject to the visitation and superintendence of the Archbishop of York for the time being, and that the Archbishop was to be considered as the special visitor thereof, deriving his right from the founder, and that as such, he was the proper and only person authorised to superintend and regulate and make alterations in the general conduct and management of the charity.

The VICE-CHANCELLOR dismissed the information without calling upon the counsel for the Archbishop of York to argue the case, and the *Attorney-General* thereupon appealed.

The *Solicitor-General* (*Sir W. Horne*) and *Mr. W. Brougham*, in support of the information.

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Mr. Skirrow, for the Archbishop of York.

Mr. Bagshawe, for the Dean of Rippon.

The different arguments urged by the counsel for the defendants are adverted to in the LORD CHANCELLOR'S judgment.

THE LORD CHANCELLOR:

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In this case several conflicting, or, at least, very various grounds have been taken in support of the decree, and, among others, one upon which, if it be not got rid of at the outset, the present decision must be supported, although I have no reason to think it was at all pressed on the attention of the Court below. On the contrary, indeed, this first point does not appear to have been made before the Vice-Chancellor, because the party interested in taking and insisting upon it was not heard upon that occasion.

It is urged, that in the seventh section† of the 59th of the late King c. 81, a section which is copied from the former Act, (58 Geo. III. c. 91, s. 12), this charity is exempted from the jurisdiction of the Court, because it has a special visitor. There are, however, two grounds upon which such an argument seems to me to be untenable. First, even if the fact had been so (and for that purpose there must, by the words of the clause, be a special visitor appointed by the founder), that does not exclude the jurisdiction of this Court, but would only make what the *commissioners have here done an irregular proceeding. They might inquire respecting the charity, and might give their instructions to the *Attorney-General*, who, if he thought proper, might still bring the case before me. I have no knowledge of the commissioners, or of the manner in which this information was filed. A stage in the cause will afterwards occur when that circumstance may be material; either when the question of costs comes to be determined, to be answerable for which is the purpose of having a relator named, or when the right of appeal is intended to be asserted. In the latter case, if these proceedings have been regularly instituted under the powers given by the Act of Parliament, the right of appeal is cut off, and the decision of this Court is made final and conclusive. All I can do at present is to know that the proceeding is now here: since the *Attorney-General* may always, if he thinks it for the public interest, file the information *ex officio*.

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† This section (among other things) provides that the Act shall not extend "to any college, free-school or other charitable institution or donation or

charity whatsoever, which has special visitors, governors, or overseers appointed by the founders." [Repealed, S. L. Rev. Act, 1873.]

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My second answer to the objection is, that this case does not fall within the exemption in the Act ; and I am clear that it does not. I cannot allow it to be stated that such an objection is the legitimate inference to be collected from the principles laid down in *Philips v. Bury*.† In that case, which is one of great authority, Lord HOLT has laid it down, that every incorporated charity must, if ecclesiastical, have the ordinary for its visitor ; if lay, the patron. Now all that is proved, and, indeed, contended for, before me is, that the patron is the Archbishop of York. And, no doubt, he is ; but it is not thence to be inferred that, because Lord HOLT has said, that where the hospital is lay the patron is the visitor, therefore, for default of a special visitor, the patron is a special visitor. The very reverse, indeed, is *the fact ; since he only can be a special visitor who is specially named and appointed by the founder. And such is the language of the statute ; for by the seventh section, which exempts certain charities from the jurisdiction of the commissioners, the operation of the Act is confined to such charitable institutions as have no special visitor appointed by the founder. In such cases, to use the language of Lord HOLT, the corporation, if spiritual, has for visitor the ordinary, if lay, it has the patron ; not the patron appointed as visitor, but the patron taking the office for want of a special appointment. Suppose, for example, the founder should appoint a warden without appointing a visitor ; it by no means follows that, because a statute afterwards appoints that person to be visitor whom the founder had appointed to be warden, the person so appointed should become the special visitor ; or that from that circumstance, on any reasonable construction, the founder, and not the Legislature, should be held to have made the appointment of the visitor. He appointed the warden, and that was all. Upon both of these grounds I am clearly of opinion, that the jurisdiction of this Court is not ousted by the Act of Parliament.

The next question is, was this a beneficial interest, or was it a trust ? And upon all the circumstances of the case, and upon the whole of the evidence, my opinion is, that it was a trust only. It may be observed that the patron, who clearly is the

† 2 T. R. 346.

Archbishop, does not seem to put in any claim to it; and though Lord Holt lays it down that the patron is the visitor, there is not a shadow of pretence for holding that the Archbishop ever exercised his rights as visitor, but on the contrary, as far as appears, he has repudiated that character. When I recollect, moreover, that the prelates are so jealous, and very properly so jealous, in watching over their *visitatorial powers and privileges, there is a very strong presumption against the existence of the visitatorial power in this instance, and that the Archbishop is not in any sense—neither in the sense in which Lord Holt uses the expression when he speaks of a patron being the visitor, nor in the sense of an actual visitor—a person who has been vested with that power. No particular words are necessary to constitute a visitor. Nor can any man doubt what the powers of a visitor are. In practice they are perfectly uncontrolled—of removal, new appointment, variation, and alteration. They are, in truth, of a most extensive and arbitrary nature; and in a celebrated case of the *Archbishop of Canterbury*,† it was laid down, that in his capacity of visitor, an archbishop may refuse a licence; and that the Court could do no more than put by *mandamus* the visitatorial powers in motion, which might then move in a directly opposite direction to what the Court wished or intended, the visitor being at liberty to pursue his own course without assigning any reason. The visitor has only to move, and then the case is without review. These powers are perfectly well known; and it is therefore singular that it is not pretended that such visitatorial powers were ever used either by the present or by any former Archbishop.

Upon the rest of the case, I am still more at a loss to see how it can be pretended that the principal defendant here, the master of the hospital, has an exclusive beneficial interest in the surplus. He is appointed by the Archbishop to be the master. That appointment gives him the mastership, the right to be pernant of all the profits, and it makes him subject to all the duties; but the question is, Does he in his capacity of master take *beneficially or as trustee? On the whole of the evidence, I have no doubt that it would be doing violence to the institution

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† *R. v. Archbishop of Canterbury*, 13 R. R. 409 (15 East, 117).

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to consider that, in virtue of the appointment, he does any thing more than take the profits *quâ* master, it being admitted that he does not take them by his institution as Dean of Rippon. When an existing foundation receives a new endowment, which in no respect alters the original constitution, there is no necessity to have a separate appointment to each, if the two are inseparably annexed. In such a case, assuming it to be necessary that the master should have institution and induction, the institution and induction to the deanery would be also institution and induction to the hospital. No such thing, however, is alleged here; but first there is an induction to the deanery, and then there is institution and induction to the hospital, the patronage of the former being all the while vested in the Crown.

The revenues must be applied according to a scheme to be approved by the Master; and the Dean must be at liberty to carry in proposals, and his suggestions will no doubt be attended to.

1831.

March 15.

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On Appeal.

Lord
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WARE *v.* THE GRAND JUNCTION WATER WORKS COMPANY.†

(2 Russ. & Mylne, 470—486; S. C. 9 L. J. Ch. 169.)

A court of equity will not, at the instance of a shareholder, restrain a joint stock company incorporated by Acts of Parliament which prescribe its constitution and objects, from applying in its corporate capacity to Parliament, and from using its corporate seal and resources to obtain the sanction of the Legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers.

The right of making such an application is incident to a joint stock company of that description.

By [various Acts of Parliament the proprietors of the Grand Junction Water Works Company were established as a company for making and maintaining works necessary for the purpose of providing and supplying with good and wholesome water from the river Thames, the inhabitants of the several buildings erected and to be erected in the parish of Paddington and the adjacent parishes and districts, and power was given to them to make

† *In re London, Chatham & Dover Railway Arrangement Act* (1869) L. R. 5 Ch. 671, 20 L. T. 718.

and maintain works necessary for supplying the aforesaid inhabitants with water to be drawn from the river Thames at or near Chelsea, and to supply such water works accordingly with water from the said river to such extent and under such restrictions as were expressed in the said Acts.]

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The bill, which was filed by one of the proprietors, suing on his own behalf only, against the Grand Junction Water Works Company and their clerk [stated that several of the members of the Company, some of whom were now directors, had formed a design to depart from the provisions of the said Acts of Parliament], and in lieu of the same intended and proposed to make a new cut or aqueduct from the river Colne, to commence at a place in the parish of Iver in the county of Bucks, and to terminate in or near the parish of Paddington, and to pass through or into a great number of intermediate parishes and townships for the purpose of supplying with water from the said river Colne not only the inhabitants of Paddington, and the parishes and streets adjacent, but also the inhabitants of the several intermediate parishes and townships; and that the said directors and shareholders were desirous to apply to Parliament to enable the Company so to do, as well as to obtain authority to raise a further sum of money for making and completing the several works which such purposes would require, and that they were also desirous to apply part of the Company's funds in defraying the expenses of applying for, and obtaining an Act of Parliament for such several purposes, and to use the Company's name and seal for obtaining such Act.

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The bill went on to state the different proceedings which had been taken by the Company, in and subsequently to the month of November, 1830, for the purpose of prosecuting an application to Parliament for the necessary powers to carry their proposed plan into execution; and it set forth the notices which had been issued to the proprietors previously to the holding of the several meetings at which the proposed plan was taken into consideration. It then stated, that several shareholders who attended such meetings strongly opposed *the adoption of the plan, but that their opposition having been overruled, resolutions were passed, empowering the directors to apply to Parliament in the present

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session for an Act to amend and enlarge the powers of the Company, and to enable the Company to form and maintain an aqueduct from the river Colne to London, and to constitute the Company a corporation for taking and distributing the waters of that river; and further authorising the directors to enter into such contracts as they might deem expedient for the purchase of property on the river Colne, or in the line of the intended aqueduct. The bill then stated, that a draft of the proposed Act, which was to effect these objects, had been submitted to the shareholders and been approved by them, and a resolution passed that it should be presented to Parliament. * * *

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The bill prayed that the defendants, the Grand Junction Water Works Company, might be restrained by injunction from presenting any petition or making any application to Parliament, and from taking any other proceedings for obtaining an Act to enable them to make any cut or aqueduct from the river Colne, for the purpose of supplying with water either the metropolis or the inhabitants of the parish of Paddington, or of any other parishes, hamlets, or townships whatsoever, or any company of proprietors already, or hereafter to be authorised to supply such parishes or places with water, or to enable the said Company to construct any reservoirs or other works for the purposes aforesaid, or to raise any sum of money for making and completing such works; and that they might, in like manner, be restrained from using the seal, name, funds, property, credit, or officers of the Company, in or towards the making such cut or aqueduct, or the constructing of such works, or in support of any petition to or bill in Parliament for the purposes aforesaid, or from employing them, or permitting them to be employed in any manner repugnant to the now subsisting provisions of the said Acts of Parliament, or the purposes for which the Company was now established.

The material allegations in the bill were verified by affidavit.

The VICE-CHANCELLOR having, upon argument, made an order for a special injunction in the terms of the prayer of the bill, the defendants now moved for the discharge of that order.

The *Solicitor-General* (Sir W. Horne), Mr. Pepys, and Mr.

W. Russell, in support of the motion [cited *Mayor of King's Lynn v. Pemberton*.†]

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Sir E. Sugden, Mr. Knight, and Mr. Girdlestone, jun. in support of the injunction :

* * If this were the case of a private partnership in which some of the partners were applying for an Act of Parliament to extend or vary the powers of the Company under their deed of partnership, the Court would at once interpose on the ground of the flagrant breach of faith which they were committing against the dissenting partner ; and the circumstance that this is a joint stock company, the constitution of which has been solemnly settled by Acts of Parliament, rather strengthens than weakens the ground for interposition. That was the deliberate opinion of Lord ELDON in the case of *Natusch v. Irving*,‡ which is a strong authority for the present injunction, and is perfectly reconcileable with the doctrines laid down by the same Judge in the subsequent case of *Mayor of King's Lynn v. Pemberton*.

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THE LORD CHANCELLOR :

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This injunction consists of two branches which are manifestly and widely distinguishable ; the one overriding and embracing the whole of the introductory and concluding portion of the order ; the other, being the part which lies between them, and being of comparatively small importance. The first branch refers exclusively to the steps which may be taken by the Company with a view to obtain a new Act of Parliament authorising the proposed alterations in their undertaking ; the second merely restrains them from proceeding to carry those alterations into execution, independently of such legislative sanction, or from using, or permitting to be used, the seal, name, funds, credit, and officers of the Company with a view to effect any such purpose under their existing constitution.

I am glad that the subject, which is one of great importance, has been fully discussed. The opinion I have formed is against

† 18 R. R. 62 (1 Swanst. 244).

Harris, 24 R. R. 108 (T. & R. 496).

‡ Mentioned in *Lindley on Partnership* in connection with *Const v.*

See now *The Partnership Act, 1890*, s. 24 (8).—O. A. S.

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the injunction as far as regards the first and last parts of the order; but as far as regards the intermediate portion, I shall permit it to stand.

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It is quite idle to represent this, as was at first sought to be done, as an attempt to restrain by injunction the proceedings of the High Court of Parliament. This is no injunction to restrain any proceedings of Parliament, or to restrain any parties who may be called upon by the authority of Parliament from intervening in such proceedings. It is simply an injunction to restrain a partnership now existing under a certain constitution from doing any act in its corporate capacity with a view to obtain a new modelling of that constitution, say an extension, or a variation, or even a total change of it. *I am of opinion that the right to take proceedings in Parliament in the way that is proposed is incident to a corporation of this nature; at the same time fully admitting that the shareholders are certainly not entitled to do anything which the partnership prohibits, or which those Acts of Parliament, which, in truth, constitute their deed of partnership, give them no authority to do.

Although, therefore, I am now disposed to support the injunction as to all such acts as are not authorised by the present constitution of the Company, I will not interfere to restrain the Company, *quâ* corporate body, from applying to the Legislature and obtaining a change in its constitution, which will put those Acts of Parliament upon a different footing, by extending its powers or by substituting a new body for the old. I can see nothing in the nature of a corporate body of this description to prevent that body from so dealing with itself, and asking for such an extension or variation of its constitution. A corporation may apply to the Crown for a new charter; and the new charter, when accepted, binds the corporation and gives it a new existence. And why may not such a body as this in like manner apply to Parliament for an alteration and extension of its powers? It was said that if corporate bodies of this description are allowed to make such an application, those who rely on that constitution are deceived because they come in upon the faith and footing of its being a partnership of a certain kind, and now it is sought to be materially varied. But are not a man's eyes open to the

fate that attends him when he enters into a partnership with a body of this kind? Does he not know that he is liable to this contingency, and either that the Company ought to have the power of obtaining an alteration in its constitution, or that he ought to come in as a member of it under certain conditions and restrictions?

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All the arguments used here touching the great change to be effected by the new project—that the change is as great as if, instead of a canal, there was to be an application to convey by steam upon a railroad—that it is likely to ruin the proprietors, and the like,—are still open to the plaintiff before a committee of the House of Commons or House of Lords. There is not a single individual, who fancies himself aggrieved by the proceedings, who may not apply in person before that tribunal, and by his agents, counsel, and witnesses oppose the passing of the bill into a law. Is not that the old, regular, and constitutional mode, and is not this a new and an irregular mode of proceeding? If this application is listened to, every time a new Act of Parliament is applied for by a body, consisting, like this Water Company, of 600 or 700 proprietors, if a single member chooses to differ from the rest (and, indeed, but for that very difference the intervention of Parliament would, in most cases, be unnecessary) before the corporate seal can be carried to Westminster at the foot of a petition by the Company praying for an extension of its powers, the matter must first be discussed here upon an injunction bill; and if it survives the injunction bill, then, and not till then, will it come to its proper tribunal. I, for one, am not prepared to open this door to litigation. There never was so wild a dream as to imagine that, by refusing this motion, I shall overturn a decision of Lord ELDON's in *Natusch v. Irving*. I am rather, in fact, affirming that decision; but if I upheld the whole of this injunction, I should be going against the principle of the case of *The Mayor of King's Lynn v. Pemberton*. The language of Lord ELDON's judgment in the latter case† plainly shews that he could not have done what he is represented as having done in *Natusch v. Irving*.

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It is said that this is an attempt on the part of the Company

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† 18 R. R. at p. 68 (1 Swanst. 251).

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to do acts which they are not empowered to do by the Acts of Parliament. So far I restrain them by injunction from any conversion or application of their funds that is not authorised. But that is not what the plaintiff now asks; for he asks me to restrain them from doing that which will make what they propose to do a lawful act.

It is urged that one partner has been restrained from accepting and indorsing bills, the produce of which is intended to be applied to what are not partnership purposes or transactions, and that the present is the converse of that case. But that argument proves a great deal too much. There the restraint is imposed upon one partner; here it is conceded the object is to restrain every one of the partners, whether they amount to one hundred or a score. Now the Act of Parliament will, if it is procured by any one, be binding upon the whole body, however much the others may reclaim against it. And yet it is not pretended that such an injunction could be granted to restrain one. This is sufficient to shew the wide distinction that exists between restraining the act which is here sought to be performed, and restraining an individual partner from doing acts which are contrary either to the express or implied contract of partnership.

The dealings between the parties and the whole of the objections are still open in the proper place. With the trifling exception adverted to, therefore, the

Injunction must be dissolved.

1831.
March 2, 8, 9.

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DEVAYNES v. NOBLE.

(2 Russ. & Mylne, 495—507.)

[A NOTE of this appeal will be found at the end of the report of the hearing, before the Master of the Rolls, in 15 R. R. at p. 173. The case of *Vulliamy v. Noble*, referred to in that note, is now reported in 17 R. R. 143. The reference to that case should have been given as 3 Mer. 593.]

MARTIN v. MARTIN.†

(2 Russ. & Mylne, 507—530.)

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After the marriage of a female ward a settlement was made, under the direction of the Court, for the benefit of the wife and children of the marriage, of a moiety of a plantation in Demerara, of which the wife was seized in fee at the time of the marriage; the husband and wife afterwards mortgaged the estate to persons having full notice of the settlement; by the law of Demerara the settlement was a nullity:

Held, that the mortgage was valid, inasmuch as the equity of the wife and children attached only upon the person of the husband.

THE plaintiff Maria Elizabeth Alleyne Martin, was entitled to considerable personal estate, and to the fee simple of a moiety of a plantation in the colony of Demerara, called New Orange Nassau, and also, in the event of her attaining twenty-one, and of her brother dying under that age, to the fee simple of the other moiety of the same plantation. She and her brother being both infants, a suit in their names, for the protection of their persons and fortunes, was instituted by their next friend in the Court of Chancery in England against all proper parties: pending that suit, the female plaintiff, before she or her *brother attained the age of twenty-one years, intermarried, without the consent of the Court, with the defendant Anthony Crosbie Martin: and an order was made in the cause, referring it to Mr. Popham, then one of the Masters of the Court, to approve of a proper settlement of her real and personal estate upon her and her children. In pursuance of that order an indenture of settlement, dated the 27th day of August, 1802, and made between Anthony Crosbie Martin and his wife of the one part and John Longden and David Milne of the other part, was approved of by the Master, and duly executed. By this settlement Anthony Crosbie Martin, in consideration of the marriage assigned to John Longden and David Milne, all the personal estate of Maria Elizabeth Alleyne Martin, and all right, of him Anthony Crosbie Martin, in the same upon trust, after raising a certain sum for the purposes therein-mentioned, to invest the

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† *British South Africa Company v. Mercantile Investment, &c. Co. v. River Companhia de Moçambique*, '93, A. C. *Plate Loan, &c. Co.*, '92, 2 Ch. 303, 602, 63 L. J. Q. B. 70, 69 L. T. 604; 61 L. J. Ch. 473, 66 L. T. 711.

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trust premises in Government or real securities as therein-mentioned; and upon further trust, during the joint lives of Anthony Crosbie Martin and the plaintiff his wife, to pay the income of the trust funds to the separate use of the wife without power of anticipation, and in case she should happen to survive her husband, and there should be one or more child or children of the marriage, then, as to one moiety of the said trust funds, upon trust, to pay the same unto Maria Elizabeth Alleyne Martin for her absolute use]; and after declaring, as to the other moiety, certain trusts for the benefit of the issue of the marriage, it was by the indenture further agreed, that, in case there should be no child of the marriage, who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then John Longden and David Milne should, from and after the decease of Anthony C. Martin and such failure of children [transfer the last-mentioned moiety unto Maria Elizabeth Alleyne Martin for her absolute use: And it was thereby also agreed and declared, that, in case Anthony C. Martin should happen to survive his wife, and there should be one or more child or children of the marriage, then, one moiety of the said trust premises should be held upon trust to pay the incomes thereof to Anthony C. Martin or his assigns during his life; and subject thereto trusts were declared, for the benefit of the children of the marriage, and Anthony C. Martin in manner therein-mentioned: But if there should be no child of the marriage who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then the trustees were, in case Anthony C. Martin should survive his wife, to permit and suffer him and his assigns to receive the whole income during his natural life; and after his decease, to pay, transfer the trust funds to the testamentary appointees of the wife, and in default of appointment, to her next-of-kin, as if she had died without having been married and intestate: And Anthony C. Martin did for himself, and for his wife, covenant with John Longden and David Milne, their heirs, executors, and administrators, and she Maria Elizabeth Alleyne Martin, so far as she lawfully might, did agree, that in the case she should live to attain the age of twenty-one years, or such other age, as,

according to the laws of the colony of Demerara, should render her competent to concur in the settlement, he Anthony C. Martin and she Maria Elizabeth Alleyne Martin, and all other persons claiming, under, or in trust for them or either of them, would, as soon as might be, at the costs and charges of Anthony C. Martin, assure unto John Longden and David Milne, their heirs, executors, and administrators, as well all that undivided moiety of them Anthony C. Martin and Maria his wife or one of them in her right, as also the other moiety to which she, or Anthony C. Martin in her right, was entitled in reversion or remainder, expectant upon the decease of her brother under the age of twenty-one years, of and in the plantation called New Orange Nassau, with the buildings thereunto belonging, situate in the colony of Demerara, with the plantation utensils and implements, slaves, cattle, and all other estate real and personal thereunto belonging, situate, lying, and being in the said colony, with the appurtenances, to hold the same unto and to the use of them John Longden and David Milne, their heirs, executors, administrators, and assigns, according to the tenure, nature, and quality of the same premises respectively, upon the trusts thereinbefore expressed concerning the before-mentioned trust funds, or as near thereto as the nature of the several properties would permit; and, in order that the respective estates thereby settled and covenanted to be settled might go in the same course of succession, it was agreed and declared that the plantation, hereditaments and premises, should, for the purposes of the settlement, be considered as personal estate; and that in the meantime the produce of the premises so to be assured should be paid to the same persons, and in the same manner, as if such assurance had been actually made.]

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Maria Elizabeth Alleyne Martin, some time after, attained the age of twenty-one years; and by indentures of lease and release, bearing date the 21st and 22nd days of January, 1806, indorsed on the indenture of settlement, and made between Anthony C. Martin and Maria his wife of the one part, and John Longden and David Milne of the other part, [Anthony C. Martin and Maria his wife conveyed to John Longden and David Milne, their heirs and assigns, all that one undivided moiety of them, Anthony

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MARTIN. C. Martin and Maria his wife, or one of them in her right, of and in the premises in and by the indenture of settlement agreed to be conveyed and assigned respectively, upon the trusts, in and by the indenture of the 27th of August, 1802, declared concerning the same.]

[513] These several indentures were duly recorded in the proper office in the colony of Demerara.

[514] The brother of Mrs. Martin attained twenty-one and afterwards died, leaving a daughter Jane L'Espinasse his only child. David Milne was his executor and the guardian of his child.

In the year 1807, or soon afterwards, the plantation and estates became indebted to various persons for stores and supplies; and it was deemed necessary to raise a sum of money for the use and benefit of the estate, and to meet the wants of Mr. and Mrs. Martin, and of Jane L'Espinasse. [David Milne applied to the house of Reed and Bell in London: and it was ultimately agreed between Mr. Milne and the firm of Reed and Bell that they should make the necessary advances for the estate, and receive the consignments; and that a mortgage should be executed to them of the plantation and property in Demerara to secure to them the advances they might make in respect of it. In pursuance of this arrangement, Messrs. Reed and Bell advanced money and accepted bills; and by an indenture of mortgage dated the 31st of March, 1809, and made between Anthony C. Martin and Maria his wife of the first part, John Longden and David Milne of the second part, and James Bell of the third part, which James Bell together with Charles Reed
[516] were then the partners of the house of Reed and Bell,] in consideration of the said sum of 1,000*l.* paid to Anthony C. Martin and Maria his wife, and to David Milne as such guardian as aforesaid, in trust for Jane L'Espinasse, and for the other considerations therein mentioned, John Longden and David Milne [and Anthony C. Martin and Maria his wife, and also David Milne, as such executor or guardian as aforesaid, conveyed to James Bell, his executors, administrators, and assigns, all that the entirety of the said plantation commonly known by the name of New Orange Nassau, with buildings thereunto belonging,

situate in the colony of Demerara], together with the plantation, utensils, and implements, slaves, and cattle, and the offspring and progeny thereof respectively, to hold unto James Bell, his executors, administrators, and assigns for the term of 1,000 years thence next ensuing, subject to a proviso for redemption on payment of the sum of 1,000*l.* and interest, in manner therein mentioned, together with such further sum or sums of money, not exceeding the sum of 3,000*l.*, which James Bell should advance for Anthony C. Martin and the plaintiff, and also David Milne, in their respective capacities, with interest at the rate aforesaid.

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This indenture was executed by Anthony C. Martin and Maria his wife, and by David Milne, and was duly enrolled and registered at Demerara, according to the law prevailing in that colony.

The advances made by the house of Reed and Bell on account of the plantation and its owners having greatly exceeded the amount of their mortgage, Messrs. Reed and Bell requested from David Milne and Anthony C. Martin and Maria his wife a further security; and accordingly a deed-poll of further charge and mortgage, bearing date the 14th of September, 1812, was endorsed on the last-mentioned indenture of mortgage. * * *

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David Milne executed this deed-poll for himself, and, by power of attorney authorising him so to do, for the other parties to it; and it was duly enrolled and registered in the colony of Demerara. The name of James Bell, it was admitted, was made use of in these transactions as a trustee on behalf of himself and of Charles Reed as copartners.

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The sums of money advanced by Messrs. Reed and Bell on account of the plantation and the owners of it, subsequently to 1812, having greatly increased in amount, it became necessary that a further security should be executed to them; and accordingly a power of attorney, bearing date the 1st of March, 1815, was executed by Anthony C. Martin and his wife to John Wilson, Esq. of Demerara, thereby authorising him to appear before the commissioners of the court of civil and criminal justice of Demerara, and in the names of them Anthony C. Martin and Maria his wife, as the lawful proprietors of an undivided moiety of the plantation

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named New Orange Nassau, to declare them Anthony C. Martin and Maria his wife to be truly and justly indebted unto James Bell of London, merchant, a partner in the mercantile house or firm of Reed, Bell & Co., his order, heirs, or assigns in the sum of 8,612*l.* 19*s.* 5*d.*; and to promise to repay the sum of 8,612*l.* 19*s.* 5*d.* to James Bell, his order, heirs, or assigns, free and without charges, in three equal annual instalments, at the times therein mentioned, with interest; and for the better security thereof, to put the said J. Bell in possession of the one undivided moiety of the plantation called New Orange Nassau, with all negroes thereupon belonging to the same, buildings, and further dependencies, to be taken by both the respective parties, according to the inventory thereof, until the debt of 8,612*l.* 19*s.* 5*d.*, with the interest due thereon, should have been paid off and settled; with power to James Bell to administer *alone the undivided half of the plantation, or to cause it to be administered by his agents, and to ship and consign the produce already in hand and further to be gathered to such persons or houses of trade in London, and, in case of the surrender of the colony to Holland, in Amsterdam, as James Bell should think proper. The instrument contained various other clauses in order to make the security effectual, according to the law of the colony.

A similar power of attorney was executed to John Wilson by David Milne and John Longden; and the name of the defendant James Bell was used in both these documents in trust for himself and his partners.

By virtue of these powers John Wilson appeared as the attorney of Anthony C. Martin and his wife, and of J. Longden and David Milne as trustees, before the court of criminal and civil justice at Demerara, and, in the forms required by the Dutch law, passed a mortgage of a moiety of the plantation, dated the 1st of September, 1815, in the terms and upon the conditions contained in the letters of attorney. Shortly afterwards, what was called a sentence of willing condemnation was obtained against the plantation, whereby the house of Reed, Bell & Co., became entitled to sell the plantation, and to apply the money arising from the sale in liquidation of their debt.

At a subsequent period Bell and Grant became the successors

in business of Reed and Bell, and the debt and the securities were vested in the new firm.

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A settlement of accounts having taken place, an agreement was entered into, bearing date the 27th day of April, 1820, and made between Bell and Grant as copartners *of the one part,

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and Anthony C. Martin and his wife of the other part, whereby * * Anthony C. Martin and the plaintiff his wife and the defendants did thereby severally and respectively covenant with the other and others of them, that the amount then due from Anthony C. Martin upon the several mortgages should be agreed at the sum of 9,000*l.* as a final balance, such balance to be

binding and conclusive on both parties; * * and neither party should be at liberty to open the same, and revive any of the claims or disputes existing between them, touching the amount of the debt or the debts claimed thereupon, previously thereto; that Anthony C. Martin and his *wife, and all other necessary parties, should, at the request of the defendants, make and execute all such further deeds, instruments, and assignments, as might be necessary and proper to carry that agreement into full effect; and that in case of such default as aforesaid, the several mortgages so held by or in trust for Bell and Grant should, notwithstanding that agreement, be in full force and effect for the sum of 9,000*l.*, or the greater or less sum actually due, as the case might be, and interest at 6 per cent. per annum.

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In order to carry this agreement into effect, a power of attorney, bearing date the same 27th of April, 1820, was executed by Anthony C. Martin and his wife, George Milne, the son of David Milne, James Christian Clement Bell, described as the heir-at-law and administrator of James Bell, and Robert Grant his partner, by which, after reciting the articles of agreement, the parties constituted Frederick Cost of Demerara their attorney, and authorised him to appear in the Court of Civil and Criminal Justice in the colony of Demerara, and to acknowledge and declare that he Anthony C. Martin was justly indebted unto Bell and Grant, upon and by virtue of the mortgage of the 5th of September, 1815, in the sum of 9,000*l.* sterling; and to confirm to them the full possession of the moiety of the plantation, negroes, and stock granted by John Longden and David Milne.

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Frederick Cost, in pursuance of this power, and in the forms required by the Dutch laws, duly passed the mortgage, and took all necessary steps for carrying the articles of agreement into effect. The time stipulated for the payment of the sum of 9,000*l.* expired on the 29th of June, 1821; and the money was not paid.

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The sums of money secured by the mortgages were advanced by Reed and Bell and their successors in business, partly for the purpose of satisfying and discharging *the debts due from the moiety of the plantation belonging to Anthony C. Martin and the plaintiff his wife, or one of them; partly, at the request and entreaty of Mrs. Martin, for the subsistence of herself, her husband, and children, to provide them with comforts, and to preserve them from wanting the common necessities of life; and partly for the purpose of supplying stores for the use of the plantation, and in their character of consignees to the plantation.

In 1820, a suit was instituted in the Court of Chancery, in the name of the infant Jane L'Espinasse, by her next friend, to which Reed and Bell, together with A. C. Martin and his wife, and George Milne, were defendants. By a decree in that suit, bearing date the 25th day of March, 1820, it was referred to the Master to inquire whether the estate of the infant had been or was liable in respect of any, and if any, of which of the several sums secured by the mortgage and further charge bearing date the 31st of March, 1809, and the 5th of September, 1815. The Master made his report in that cause on the 20th of February, 1821; and by it he allowed the defendants Reed and Bell such sums as were properly chargeable against the infant's moiety.

The present bill was filed by Mrs. Martin for the purpose of having it declared that the several mortgages and charges were fraudulent and void, as against the articles of agreement of the 27th day of August, 1802, and the settlement of the 21st and 22nd days of January, 1806.

A cross bill was filed by James Christian Clement Bell and Robert Grant, the present partners in the firm of Bell and Grant, for the purpose of establishing the mortgages and charges.

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By the decree made at the original hearing of these causes, bearing date the 15th of December, 1829, it was referred to the Master [to make certain inquiries].

In pursuance of this decree the Master made his report, and thereby found that, according to the Dutch law, which prevails in the colony of Demerara, upon a marriage without any ante-nuptial contract, a community *of the real and personal estate of the husband and wife takes place; that the Dutch law does not permit or acknowledge, as valid, any kind of settlement made prior to the marriage; that the intervention of trustees, in such a deed, is a proceeding entirely unknown, and would make no difference, but would be considered merely as *in fraudem legis*; that the right of the husband and wife, during the coverture, must remain in the same state as they were fixed at the period of their union, that is to say, that a community of property and goods then immediately takes place between them; that neither the husband nor wife, either alone or together, can make any alteration whatever in that state of property by any settlement in favour of themselves or their issue; that no such settlement would be valid or binding; that, according to the said law, a real estate cannot be passed by deed only, but it is necessary that the transfer thereof should be passed and executed before the magistrates and the justices of the place where the property is situated; that the legal estate in the moiety of the plaintiff Maria Elizabeth Alleyne Martin of the plantations and premises in the pleadings mentioned did not pass to the trustees by the deeds of lease and release, bearing date respectively the 21st and 22nd of January, 1806; that, by the law of Demerara, and in a case where there was no ante-nuptial contract, no contracts binding the wife's real property can be made, after marriage, between the husband and the wife, or between the husband and other parties as trustees for the benefit of the wife and children; that the inquiry whether, after a valid settlement for the separate benefit of the wife, with remainder to the children, the husband can renounce the benefit of it in favour of creditors, proceeded upon an assumption wholly unknown to the Dutch law; that, by such law, the only settlement which is permitted is termed *an ante-nuptial contract, the sole effect of which is to exclude community in respect of the property the subject of such settlement; that there is no mode of settling the property upon the children of the marriage by means of an ante-nuptial contract;

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that an ante-nuptial contract cannot be varied by the husband and wife in favour of each other, but the wife with the consent of the husband, or the husband with the consent of the wife, can mortgage or charge the settled property, or property excepted from the community, in favour of creditors or third persons, either for the purpose of paying off the debts of the husband, or of satisfying judgments to which the property was previously liable, or of purchasing, providing, or paying for stores and necessities supplied to plantations and estates, situate in the colonies, and particularly in the colony of Demerara, and generally for the payment and satisfaction of any debts validly contracted; that as the Dutch law forbids women to become sureties, it is necessary, when a settlement has been made previous to marriage, and the wife is desirous of subjecting her separate property to the private debts of her husband, that she should, in the deed itself, expressly renounce the benefit of such law, without which the deed would not be valid and effective as to such property, but it is incumbent on the wife to prove that such charge or incumbrance was created on account or in respect of the private debts of the husband; and when the consideration is for necessities supplied for the support and maintenance of the wife and family, or for the supply of stores and provisions for the separate estate of the wife, it would not come within the rule. The Master further found, that, upon the marriage of the plaintiff without any ante-nuptial contract, a community of the moiety of the plantation ensued, and thereupon Anthony C. Martin, assisted by his wife, or even alone, as the legal disposer of the property in community, was enabled, in favour of *creditors or third persons, to vary and alter the state of the property, by any deed or act, for a valuable consideration; that such deeds, or acts, are valid and binding; that the effect of the community of goods is to form a common stock of the whole property, both moveable and immoveable, possessed by the husband and wife at the time of their marriage, or acquired subsequently, which common stock is liable to all debts and engagements of either party existing at the time of or contracted during the marriage by the husband, or by the wife with his concurrence; that Anthony C. Martin and the plaintiff having become indebted to

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the defendant's predecessors in trade, in considerable sums of money, the mortgage of the 1st of September, 1815, passed under the authority of the powers of attorney executed by Anthony C. Martin and the plaintiff his wife, and by John Longden and David Milne, was duly passed, in conformity with the law and practice of the colony, for the purpose of securing such sums of money; that the legal estate in the moiety of the plantation in question, by the law of Demerara, vested in the said James Bell, upon the 1st of September, 1815, by means of the mortgage, and that thus the legal estate was then vested in the defendant James Christian Clement Bell as the heir-at-law of James Bell. The Master further found, that by the law of Demerara there is a lien upon the estate for monies advanced for the support of a wife and her children, and for stores, supplies, and necessities furnished for the estate; and that it made no difference, in this respect, that the estate was originally the estate of the wife, and had been excluded from community by means of an ante-nuptial contract.

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The two causes now came on to be heard on further directions on the Master's report.

Mr. Tinney and Mr. Garratt, for the plaintiff.

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Mr. Bickersteth, Mr. Pemberton, and Mr. R. Roupell, for the defendants.

On the part of the plaintiff, it was contended that the validity of the incumbrances was to be tried by the law of England. The parties were resident here, when the marriage took place and the settlement was made: the trusts of that settlement bound the property in the hands not only of the husband and wife, but of all who acquired interests in it with notice of the equitable rights to which it was subject. It was of no importance that Bell had got the legal estate; for the advances were made with full notice of the settlement, and the defendants could not be permitted to use the legal estate to defeat the equitable interests of which they had notice before they advanced their money. The settlement contained an express provision that the plantation

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should be considered as personalty; and if a suit had been instituted to have the trusts of the settlement carried into effect, the Court would have directed the plantation to be sold. The plaintiff had a right to that relief; and when the property was converted into money, the proceeds would be dealt with only according to the trusts of the settlement. The laws of Demerara might determine in whom the legal estate was; but the law of England would not permit a party resident in London, who advanced his money with full knowledge of the settlement, to make use of that legal estate to annihilate the rights of the wife and children.

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On the other hand, the defendants insisted that to argue on the supposition that the plantation was bound by the trusts of the settlement, was to beg the whole question. The rights of the different persons in the *plantation must be governed by the law of the colony: and as by that law the settlement was inoperative, the trusts which it purported to create were a mere nullity, so far as the property in Demerara was concerned.

THE MASTER OF THE ROLLS:

It has been contended for the plaintiff, that although no interest actually passed to the wife and children by the marriage settlement, yet the Court might have compelled a sale of the wife's moiety of the plantation, and a settlement of the money produced by the sale upon the wife and children: that therefore the wife had an equity affecting the estate; and that the defendants, having full notice of the settlement, were bound by it equally with the husband, and could not by their act defeat the wife's equity. But it was admitted that no authority could be found directly applicable to the case.

The point raised by the plaintiff does not appear to be of much importance to her interests; because if that point could be sustained, it seems by the Master's report that the considerations for the defendants' securities would by the law of Demerara give them a lien upon the moiety of the plantation against the plaintiff and her children, to the amount now claimed by the mortgagees.

I incline to think that if this moiety of the plantation were

unincumbered, and a bill were filed by the wife for the sale of it, and for the investment of the money produced by the sale upon the trusts of the settlement, the Court might give the relief thus prayed, upon the ground that it would effectuate the actual purpose of the Court in directing the settlement. But the settlement as executed does, by the law of Demerara, in no manner affect the right and power of *the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had, if there had been no settlement. The equity of the wife appears to me therefore not to be attached to the estate, but to the person of the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent.

It is true that if the estate had not been encumbered, the proper equivalent would have been the sale of the estate, and the investment of the money upon the trusts of the settlement; and upon a suit for that purpose the equity of the wife would attach upon the estate; but not until such bill filed, because another equivalent might have been provided by the Court. To illustrate this distinction, let it be supposed that the husband in this case had been the apparent owner of two estates of equal value, and had, under the direction of the Court, made a settlement of the estate A., and the trustees of the settlement had afterwards been evicted of this estate by the defect of the husband's title. There can be no doubt that if the husband remained the owner of the estate B., upon a bill filed by the wife, the Court would compel a settlement of the estate to the former uses, and the wife would then have an equitable interest in the estate B. But until such bill filed, the husband would remain the absolute owner of the estate B., and could effectually sell or charge it, although the purchaser had full notice of the prior settlement of the estate A. and the eviction of the trustees from that estate, because the equity of the wife was personal to the husband, and did not attach upon the estate B. My opinion therefore in this case is, that here the equity of the wife attached only to the person of the husband, and not upon the estate, and that the defendants the mortgagees, although having full notice, are not affected by that equity.

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1831.

March 19, 22.

Rolls Court.

LEACH, M.R.

[531]

IRVIN *v.* IRONMONGER.

(2 Russ. & Mylne, 531—541.)

Order of application of assets in payment of debts.

[THE will in this case is sufficiently stated in the judgment for the purposes for which the report is here retained.]

The material questions [in this case] were, in what order the different portions of the assets were to be applied in payment of the testator's debts, and whether the mortgaged estates were to pass *cum onere*.

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It appeared by the Master's report, that, at the time of making his will, and at his death, the testator was seised of freehold estates which were subject to mortgages, and of certain copyhold estates which were unincumbered, and was possessed of certain leasehold property which was in mortgage; that he also died seised of an unincumbered freehold estate, which he had purchased between the making of his will and his death; that he was indebted at his death by simple contract in a sum of 2,092*l.* 9*s.* 1*d.*, which exceeded the amount of his general personal estate, excluding the furniture given to the widow for life and the leasehold estate; and that he had no specialty debts other than those secured by mortgage.

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THE MASTER OF THE ROLLS:

The will begins with a direction that the testator's debts, funeral and testamentary charges and expenses shall be fully paid and satisfied: and this amounts to a charge of those debts and expenses upon the real estate, in aid of the personal estate. It then gives all the testator's freehold, copyhold, and leasehold estates, and all his personal estate (except his furniture, which he gives to his widow for life) to trustees in trust for the payment of certain annuities and legacies, and, subject thereto, in trust for the testator's natural *daughter for life, with remainder to her children in manner therein stated; but, in certain events, the testator gives over his freehold, copyhold, leasehold, and personal estates to several different persons.

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The personal estate not specifically bequeathed is, therefore, in the first place, to be applied in payment of the simple contract

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debts, as far as it will extend; and the surplus of those debts, not satisfied by such personal estate, is by reason of the charge in the beginning of the will to fall proportionally on the freehold, copyhold, and leasehold estates, and on the furniture given to the widow for her life. The apportionment is rendered necessary by reason of the gift over of the property to different persons in the events specified. The descended freehold estate will, in the first place, be applicable to the discharge of the mortgage or specialty debts, and the surplus of such mortgage debts will also fall proportionally upon the freehold, copyhold, and leasehold estates devised by the will, and upon the furniture so given to the widow. For the purpose of ascertaining the amount of the proportion of simple contract debts, and of the specialty debts which will be to be borne respectively by each of the freehold, copyhold, and leasehold estates, and furniture, &c., it will be necessary that the Master should ascertain the value of each separate property, and should also ascertain the amount of the simple contract and specialty debts, which, according to the foregoing declaration, will fall upon each estate and upon the furniture. But inasmuch as it is only in uncertain events that these several properties will pass to different persons, it may not be useful at present to direct that the sums thus chargeable upon each separate property, for payment of debts, should be raised by sale or mortgage; and when the cause comes on again for further directions, some provisional arrangement *may perhaps

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* * The decree directed the freehold estate, which was conveyed to the testator after the date of his will, to be sold, and the money arising from the sale to be paid into Court; the accounts of the personal estate to be continued, and the sum due in respect of the personal estate to be paid into Court: "And his Honor doth declare, that if the amount of the sums hereinbefore directed to be paid into Court shall be insufficient to pay *the

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amount of what may be found due for the costs of the parties, the sum of 2,092*l.* 9*s.* 1*d.*, being the amount of the simple contract debts due from the testator, and the legacies and subsequent interest thereon, the devisees in trust are to be at liberty to raise the amount of such deficiency by a mortgage upon the freehold, copyhold, and leasehold hereditaments and premises, which the testator was seised or possessed of at the date of his will, such mortgage to be without prejudice to the rights of any of the parties interested under the testator's will: and his Honor doth declare that the freehold, copyhold, and leasehold estates which the testator died seised or possessed of, are proportionally liable for the amount of the mortgage debts due from the testator, as also for the amount hereinbefore directed to be raised for payment of the costs, debts, legacies, and interests."—Reg. Lib. 1890, A. fol. 1899.

1891.
May 27.

MILES v. LANGLEY.

(2 Russ. & Mylne, 626—629.)

Lord
BROUGHAM,
L.C.

[A NOTE of this rehearing will be found at the end of the report, before the Master of the Rolls, in 92 R. R. 134 (1 Russ. & Mylne, 39).]

1891.
June 15.

GODFREY v. LITTEL.

(2 Russ. & Mylne, 630—637.)

Lord
BROUGHAM,
L.C.

[A NOTE of this appeal, affirming Tamlyn, 221; 1 Russ. & Mylne, 59, will be found in 31 R. R. at p. 84.]

WELLESLEY'S CASE.†

WELLESLEY *v.* THE DUKE OF BEAUFORT.

(2 Russ. & Mylne, 639—675.)

1831.
July 28.Lord
BROUGHAM,
L.C.
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Privilege of Parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind.

The clandestine removal of a ward of Court from the custody of the person with whom the ward has been residing under the authority of the Court, is in its nature a criminal contempt.

A member of the House of Commons, who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who on being personally examined by the Court admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

THIS was a motion on behalf of Mr. Long Wellesley, the father of the infant plaintiffs, and now a prisoner in the custody of the Serjeant-at-Arms for a contempt, that the order for his commitment might be discharged, on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament.

The general nature and object of the suit are stated in the report of the case of *Wellesley v. The Duke of Beaufort*, upon the question relative to the guardianship of the infant plaintiffs.‡ Mr. Long Wellesley was not himself a party to that suit. The particular circumstances out of which the present application arose are detailed in the order sought to be discharged.

The order in question which bore date the 16th day of July, 1831, recited that by an order of the 9th November, 1825, it was ordered that the Master should approve of a plan for the education and residence of the infant plaintiffs, and that Mr. Long Wellesley their father should be restrained from interfering with them in their then present situation; that by another order of the 1st of February, 1827, the Master was directed to inquire and report to what persons, other than Mr. Long Wellesley, the custody of his children, the infant plaintiffs, and *the care of their maintenance and education should be committed, and it was ordered that

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† *Earl of Aylesford v. Earl Poulett*, 40 Ch. D. 190, 58 L. J. Ch. 162, 60 '92, 2 Ch. 60, 61 L. J. Ch. 406, 66 L. T. 335.
L. T. 484; *Gent Davis v. Harris* (1888) † 31 R. R. 15 (2 Bl. N. S. 124).

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Mr. Long Wellesley should be restrained from removing the said infants, or any of them, from the care or custody of the Misses Long, and that such order had on appeal to the House of Lords been affirmed; that by another order dated the 21st of August, 1829, it was ordered that the custody of the infant plaintiffs, and the care of their maintenance and education, should be committed to the Duchess of Wellington and William Courtenay, Esq., as their guardians, with full discretion as to the course and system of the said infants' education, the persons with whom they should respectively reside, the persons to whom the immediate superintendence of their education should be committed, and the place of their residence. The order went on to state, that the female infant plaintiff was accordingly placed by her said guardians under the care of the Misses Long her maternal aunts; and it then set out the affidavit of Henry Bicknell, the house steward of the Misses Long, from which it in substance appeared that while the female infant plaintiff was residing with the Misses Long, at Unsted Wood, near Godalming, in Surrey, her father Mr. Long Wellesley, accompanied by other persons, came to their residence in the evening of the 15th of July, 1831, and in the absence of the Misses Long conducted the infant plaintiff his daughter to the carriage of the infant plaintiff his eldest son, in which, after some opposition on the part of the Misses Long's servants, he drove off with her, and proceeded to London. The order next recited that, it having been therefore prayed by *Sir E. Sugden* that Mr. Long Wellesley might be forthwith committed to the Fleet, and the female plaintiff delivered up, it was ordered that the Serjeant-at-Arms should *instantly* proceed to the residence of Mr. Long Wellesley, and demand the said infant plaintiff, and *bring her to the bar of the Court, and that the rest of the motion should stand over until the return of the Serjeant-at-Arms and the attendance of Mr. Long Wellesley in Court, either by counsel or in person: and then, after reciting that the Serjeant-at-Arms had now returned and informed the Lord Chancellor that he had been to Mr. Long Wellesley's house and had seen him, and that he (Mr. Long Wellesley) had stated that the said female infant was not there, nor should he say where she was, the order proceeded thus—"Whereupon

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Sir E. Sugden renewing his application for the committal of the said William P. T. Long Wellesley, and the said William P. T. Long Wellesley being now present in Court, and admitting that he had read the affidavit above stated, and declining to have time allowed him to answer the same, and being in person examined by the LORD CHANCELLOR on his attestation of honour, the LORD CHANCELLOR by special courtesy, waiving to examine him upon oath in the usual manner, and the said William P. T. Long Wellesley, answering upon his honour 'that he does not know where the said infant at this moment of time is;' but admitting at the same time that he has removed the said infant from the house of the said Misses Long, as set forth in the said affidavit, and stating that he has given directions to his servants or agents to remove the said infant out of the jurisdiction of this Court, and further stating, that he never would bring the said infant again within the jurisdiction of this Court,—his Lordship does declare the conduct of the said William P. T. Long Wellesley, in removing the said infant plaintiff, as set forth in the said affidavit, and in concealing the present residence of the said infant, to be a contempt of this Court; and his Lordship doth further declare the conduct of the said William P. T. Long Wellesley, in forcibly and without consent removing the infant ward of this Court, the King's subject, beyond the realm, and his refusal *now in person *coram judice* to inform the LORD CHANCELLOR where the said infant is to be found, to be a gross and aggravated contempt of this Court; and the said William P. T. Long Wellesley, notwithstanding admonition, still persisting in such his contempt, his Lordship doth order that the said William P. T. Long Wellesley be committed to His Majesty's Prison of the Fleet, until he shall clear his contempt, and this Court make other order to the contrary."

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On the same day that this order was pronounced, the fact of Mr. Wellesley's commitment was brought to the knowledge of the House of Commons by a letter which the LORD CHANCELLOR addressed to the Speaker; and two days afterwards a similar communication was made to the Speaker by Mr. Wellesley, who submitted that the order was an infringement of the privileges of Parliament, and claimed to be set at liberty by the interposition

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The report of the committee, after adverting briefly to the facts of the case, and referring to the evidence, set forth in detail the different precedents which a search into the journals had furnished, touching breaches of privilege by the arrest of members of Parliament, and took notice of the several statutes which had been passed to restrain the privilege of Parliament. It then stated that the committee, after every inquiry, had been unable to find any case, in which the right of the Court of Chancery to commit for contempt, had been enforced against persons entitled to privilege of Parliament. The [*643] *cases of *Lady Wenman*[†] and *Lord Roscommon*,[‡] which had been mentioned, the committee did not consider to be conclusive; the former being that of an Irish peeress who in the 7 Geo. I. was committed for a contempt by the then LORD CHANCELLOR, and was at that time entitled to no privilege in England; while the latter was that of an Irish peer in the 10 Geo. IV., who under the Act of Union was clearly entitled to privilege of peerage; but as the order for his commitment for a contempt, though made by the LORD CHANCELLOR, had never been executed or even taken out of the registrar's office, no opportunity occurred for questioning it in the House of Lords, the only tribunal which could decide on the extent of that privilege. The report then proceeded as follows:

“The case of the *Countess of Shaftsbury*, 10 Geo. I. § in some respects resembles the present. The Court there directed a sequestration, but did not attempt to commit a peeress who had contrived and effected the marriage of her son, an infant of the age of fourteen years, without the consent of his guardian. Your committee, having failed to discover any instance in which a member of either House of Parliament had been imprisoned for a contempt, except by the authority of the House to which he belonged, since the early cases above referred to which are

+ 1 P. Wms. 701.

§ 2 P. Wms. 102.

‡ Before Lord Lyndhurst, 1830.

imperfectly reported, have proceeded to consider this case on the grounds of analogy and of intrinsic merits.

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“The same principle, on which it has been resolved by the House of Lords that privilege shall not prevent *the courts of law from enforcing obedience to a writ of *habeas corpus*, seems to require by analogy that the LORD CHANCELLOR should possess equal powers for the protection of the wards of the Crown committed to his charge, and should be enabled to exercise the most prompt and effectual means to prevent them from being withdrawn out of his jurisdiction. The committee find the right of courts of law to commit privileged persons for some highly criminal contempts strongly asserted by different writers, particularly by Blackstone and Hawkins. Attachment for criminal contempt has been described as a judgment and execution, the conviction of an offender by a court of competent jurisdiction, and the award of a sentence for his offence. Your committee, therefore, conceive that the present case falls within the principle under which persons committing indictable offences have been considered not to be entitled to privilege.

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“Under all the circumstances of the case, the committee have come to the following resolution; that Mr. Long Wellesley’s claim to be discharged from imprisonment by reason of privilege of Parliament, ought not to be admitted.”

The motion to discharge the order of the 16th of July now came on in the Court of Chancery; and Mr. Wellesley’s leading counsel, the *Solicitor-General*, having declined to argue the case, after the report of the committee of the House of Commons, his junior, Mr. Beames, was heard by the indulgence of the Court, as *amicus curiæ*, in support of the application.

It appeared that at the time when the abduction of the infant plaintiff took place, she was, strictly speaking, without any guardians appointed by the Court; for the *Duchess of Wellington had died about three months previously, and no new appointment had been made; and as the office of joint guardian does not survive,† the guardianship of Mr. Courtenay was also determined. It was, however, assumed throughout the discussion that, as the young lady had been placed under the care of the Misses Long

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† *Bradshaw v. Bradshaw*, 25 R. R. 127 (1 Russ. 528).

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Mr. Beames, for Mr. Wellesley. * * *

[654] [In the course of the arguments, the LORD CHANCELLOR observed :]

If a court of law or of equity, upon due deliberation, entertains an opinion that a member of either House of Parliament has privilege of Parliament, that Court is, in my judgment, bound to give him the benefit of his privilege, and to give it him with all its incidents, even *although the House to which he belongs abandons it as a claim of right; for a Court knows nothing judicially of what takes place in Parliament till what is there done becomes an act of the Legislature.

* * * * *

THE LORD CHANCELLOR :

[657] * * It is no disparagement of *Mr. Beames's* learning or industry to say that he has failed to bring novelty into a discussion of so long standing that it may well be termed *vexata*: that he has failed to add any thing new, only because such an addition would inevitably have been departing from the matter which was appropriate to the discussion; only because it had been exhausted by his predecessors, and because no man could hope to be original in it without also being erroneous.

Therefore, although leaning, as I ought to do, towards the gentleman on whose behalf it has been attempted to raise a doubt, I yet feel no obligation on my part to delay the expression of my opinion upon the legal and constitutional point now made.

[658] The old authorities upon the subject of Parliamentary privilege are to be taken with very ample allowance, for they all refer to times, and exist in circumstances, wherein the claim of privilege by members of Parliament was infinitely larger than any thing

† See this Order, 31 R. R. 24 (2 Russ. 44).

upon which both Houses now are content to rest. One can hardly open a book under the head of Parliamentary privilege without being satisfied of the truth of this proposition. In the very volume of Peere Williams, from which the *Shaftsbury* case has been quoted, it is laid down in *Lord Clifford's* case† that the first process against a peer of the realm, or against a person having privilege of the Lower House as a knight of the shire, or as a citizen or burgess, is sequestration. But in another case‡ in the same book, without a name and equally without authority in these days, it is stated that the same exemption extends to the menial servants of peers; and that the first process in their case also for any contempt of Court (for no exception is made) is not by arrest of the body but by sequestration. This, too, was ruled after the Statute of William§ in restraint of privilege; and the right must indeed have existed after that Act, if the privilege ever existed in those menial servants, just as it did before the Act; for the statute saves the rights of all persons then having privilege, and makes no difference in its enactments between the case of the master and that of the servant.]

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To bring authorities either from the records of Parliament, or indeed from the records of Courts in times when privilege was so much larger than is now contended or even thought of by the stoutest champion of Parliamentary *rights,—so much more extensive that it might be said to be a different, rather than the same claim,—is manifestly of no use in disposing of the practical question now before us.

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But if any one wishes to see how far the pretensions of the Houses of Parliament have formerly been carried, to know how incumbent it is upon the courts of law to defend their high and sacred duty of guarding the lives, the liberties, and the properties of the subject, and protecting the respectability and the very existence of the Houses of Parliament themselves, against wild and extravagant, and groundless, and inconsistent notions of privilege, it would be sufficient to refer, not to the times of the Plantagenets, of the Tudors, or of the Stuarts, the records of which abound in extravagant *dicta* of the Courts, and yet more

† 2 P. Wms. 385.

‡ *Anon.* 1 P. Wms. 535.

§ 12 & 13 Will. III. c. 3.

|| See 10 Geo. III. c. 50.

WELLESLEY'S CASE. extravagant pretensions of the two Houses, but to a much later and more rational period of Parliamentary history—to the days of the family under whom happily all classes in these realms have so long enjoyed, each in its sphere, the rights of freemen.

In the year 1759 an action of trespass for breaking and entering a fishery was tried in the House of Commons, to the lasting opprobrium of Parliamentary privilege, to the scandal and disgrace of the House of Parliament that tried it, and to the astonishment and alarm of all good men, whether lawyers or laymen. Admiral Griffin made complaint to the House whereof he was a member, that three men, whose names were stated, had broken into and entered his fishery near Plymouth, had taken the fish therefrom, and destroyed the nets therein; and the House forthwith, instead of indignantly and in mockery of such a pretension dismissing the charge and censuring him who made it, ordered the defendants in the trespass, for so they must be called, to be committed *into the custody of the Serjeant-at-Arms. They were committed into that custody accordingly; they were brought to the bar of the House of Commons, and there, on their knees, they confessed their fault; they promised never again to offend the admiral by interfering with his alleged right of fishery; and upon this confession and promise they were discharged on paying their fees. So that by way of privilege, a trespass was actually tried by the plaintiff himself sitting in judgment against his adversary the defendant, and the Judge (for in this case the House and the complaining party must be considered as identical) was pleased to decide in his own favour.†

This is enough to warn courts of justice how they accede to claims of privilege the instant they hear that once magical word pronounced. Even in the event of the House of Parliament, by their Committee's report and by their votes, having decided in favour of so monstrous a pretension, I should still have deemed it my duty, if the facts of the case authorised me, to act as I am now prepared to act, or rather to continue acting. If, instead of justly, temperately, and wisely abandoning this monstrous claim,

† Commons' Journals, vol. xxviii. pp. 489, 550. The Journals of that period abound with cases of a similar kind.

I had found an unanimous resolution of the House in its favour, I should still, (and it was this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery,) I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law.

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Having disposed, generally speaking, of the authorities of those early days by these observations, I must, *however, remark further that I can find no cases in the books to justify the assertion of privilege now made. I speak not of the records of Parliament, but confine my proposition to judicial authority. This distinction I feel myself, after mature deliberation, authorised and bound to take. For let not any one imagine that when I at once and without argument ordered Mr. Wellesley to be committed to the Fleet, well knowing at the time that he was a member of the House of Commons, I was taken unprepared, or expressed a rash or unadvised opinion. The case was familiar to my mind. I had seen it in every form; I had heard it discussed in every shape; I had seen it in the court of Parliament; I had encountered it in the courts of law. In all those Courts I had borne a share in the discussion; having myself argued the greatest of all the cases† when it came by writ of error from the Courts of King's Bench and Exchequer Chamber before the highest judicature of the realm, the House of Lords, sitting as a court of law. The result of that deliberation and attention has been confirmed in my mind by more recent inquiry, and by again going over the ground I had so often previously trodden; and the conclusion I have come to is, that there is no ground whatever to maintain the claim of privilege now set up.

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To those who argue on the other side I at once make a present of almost all that *Mr. Beames* urged this morning, as to commitments for refusing to put in an answer, for refusing to pay money ordered to be paid, for resisting a decree to perform any specific act, for cutting down timber,‡ or doing any other act in

† *Burdett v. Abbot*, *Burdett v. Colman*, 12 R. R. at p. 504 (5 Dow, 165).

‡ In *Shirley v. Earl Ferrers*, Lin-

coln's Inn Hall, July 15, 1831, the LORD CHANCELLOR affirmed an order, by which it was directed that a sequestration should issue against

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[*662] the *face of an injunction, and in the face of any other order of this Court. The breach of any order, substantially of a civil description, and in a civil matter, that is, a matter touching the rights of real or personal property, will not entitle this Court, the Court of King's Bench, the Common Bench, the Exchequer of the King, nay, not even the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of Parliament, and disobeying such an order.

I leave for further observation that ingenious and acute part of *Mr. Beames's* argument where he takes the ground of denying the distinction between a civil and a criminal contempt: the only part of his argument in which I think he may be said to have thrown any new light upon the subject. I had, however, previously considered the question in this point of view; I had frequently heard it discussed, in the course of the former controversies; and it was not therefore now presented to my mind in this light for the first time.

Accordingly the ground on which I rest my denial of Parliamentary privilege in the present case is not that taken by my Lord Coke, and by the oftentimes repeated resolutions of the House of Commons,—the proposition which makes the exception but confines it to treason, felony, and surety of the peace, and maintains privilege in every other case. I have already, in the course of the argument, stated one reason why I cannot so restrict the privilege,—why I draw my line in another direction, or higher up upon the scale. If the only ground of commitment, by a court of competent jurisdiction to try the case, was that a breach of the peace had been *committed, the breach of the peace not being the main offence, but only incidental to it, and accidentally mixed up with it,—if that were the only ground, no Court could commit for a contempt unaccompanied by a breach of the peace, however aggravated the criminality of that contempt might have been. And a second consequence would also follow, that this or any other Court which had not jurisdiction of a breach of the peace could not commit at all. A justice of the

the defendant, Earl Ferrers, for cutting down timber in breach of an injunction, and that an agent of his lordship, who had been a party to the same contempt, should be committed to the Fleet.

peace could commit, the Court of King's Bench could commit; but the Court of Chancery, the Common Bench, or the Exchequer, could not commit, because they have no jurisdiction, no cognisance of the peace. WELLESLEY'S
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There are, however, many offences,—and this is the other ground of my denying that to be the right distinction,—offences for which no man can doubt the right of the Courts of Common Pleas, of Exchequer, and of Chancery, to commit; offences for which till now their right to commit has never been disputed; offences involving no breach of the peace, and for which, by every day's practice, parties are committed by those Courts, and by the Court of King's Bench, not sitting as a criminal Court.

If the line is to be assumed which has been drawn by Lord Coke in the First Institute, and followed by the Houses of Parliament without, as it appears to me, duly weighing the subject-matter, will it be said that a member of Parliament can commit perjury without punishment? That is no treason, or felony, or breach of the peace: it is not even such an offence as for which you can have "surety of the peace," the expression used in some of the Parliamentary resolutions.

It may be said, indeed, that a member of Parliament is liable to an indictment for perjury in any Court that *has competent jurisdiction, and will, on conviction, be punished in his person by imprisonment. But upon this two material observations arise: first, if breach of the peace, treason, and felony, alone give to any Court a right to take the body of a person having privilege of Parliament, where is that qualification of Lord Coke's rule, or of the resolutions of the Commons, to be found, which entitles a Court after trial and conviction to touch the person of the privileged man? From the beginning to the end of the Parliamentary discussions on the subject, there is no distinction taken between mesne process and the execution of a sentence. And yet, if the limit of the rule of privilege is to be taken from the text of Lord Coke, or from the resolutions of the Houses of Parliament, no member of Parliament could be imprisoned even upon a conviction for perjury by virtue of a judicial sentence legally pronounced. But the second observation renders the accuracy of the first immaterial. What shall be said of a

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crime nearly equal to perjury as to its effects in defeating the ends of justice, a crime which, though not in a technical sense equal, is yet in all other respects the same with perjury, I mean prevarication upon oath? If the prevarication amounts to all that moral perjury can reach, either in mischief or in guilt, if a man has twenty times over in his cross-examination told a falsehood, and his next breath has operated his own conviction of that falsehood, unless it be upon a point material to the issue to be tried, it is not perjury in law. What do the Courts, when that foul crime is committed in their face? They do not order the party to be indicted for perjury, as he would be if he had sworn falsely to a thing material to the issue—because they know that he must then escape upon a trial; but they order him to stand committed for his prevarication. In what form, and under what name? For a contempt of the Court by prevaricating on his oath. If in the Court of King's Bench a member of Parliament

[*665] *should so far forget his honour as a representative, and his duty as a man, as to prevaricate grossly on his oath, was it ever dreamt he would be at liberty to say, "true, I have prevaricated; but I am a knight of the shire, I am a citizen, or I am a burgess in Parliament; true it is, I have done that which degrades and disgraces me, that which is the most flagrant attempt that can be made to defeat the administration of justice; true it is, I have done that for committing which any other man would have been hurried from hence to a dungeon; but I am a member of the House of Commons; I have privilege of Parliament, and my person is as sacred as the oath which I have taken and broken." Were any man so ill advised as to offer such an insult to the Court, far from operating to his protection under this privilege, it is my firm belief, it is my fervent hope, that it would make him cease to be a member of Parliament by expulsion. But it is also my belief that it would, in the first instance, be visited with condign punishment by the Court whose dignity had been outraged; and that, long before the House which he had disgraced had thrust him forth, the Court would vindicate its insulted honour, and reject with scorn the plea of privilege by which he had aggravated his offence.

The line, then, which I draw is this; that against all civil

process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of Parliament, in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege: that members of Parliament are privileged against commitment, *quà* process, to compel *them to do an act; against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance; that in all such matters members of Parliament are protected; but that they are no more protected than the rest of the King's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced. Now convictions, and the sentences that follow upon them, are of two sorts; either formerly, upon trial, by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formerly, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence.

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In the case of the *Earl of Shaftsbury*,† who, when committed by the Lords' House of Parliament, whereof he was a member, brought his writ of *habeas corpus*, Lord Chief Justice RAINSFORD, in delivering the judgment of the Court, held that the Court had no right to consider the validity or the form of the warrant upon which the Earl had been committed. It was enough for that Court that a contempt was alleged, and an order of commitment made upon which the warrant proceeded; and the CHIEF JUSTICE observed that if a party guilty of contempt could not be committed to prison, there was then no punishment at all with which he could be visited for his offence.

So, if the party here guilty of the contempt cannot be committed to prison, he must escape punishment *altogether; for a breach of the peace is not necessarily incident to the contempt. And yet I should have committed just as much, had there been

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† 6 State Trials, p. 1269, How. ed.

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There are cases indeed which go a good deal further, and which justify me in denying that what, in common parlance, may be called criminal contempt, must have been committed in order to oust the privilege. If the contempt savours of criminality, and the sentence is penal, that according to the books appears to be enough.

With respect to the distinction between civil and criminal contempts, denied by *Mr. Beames*, I agree that there may oftentimes be a difficulty in finding, first, authority for deciding where the line is to be drawn, and, secondly, instances in practice for drawing it. Yet that line has been recognised by the Court of King's Bench, in *Catmur v. Knatchbull*[†] and in *Walker v. Lord Grosvenor*.[‡] The former was the case of non-performance of an award, made a rule of Court; for non-performance, being a disobedience, was a contempt of the Court, and so might be regarded as technically speaking and in form an offence. But the Court held that as it related simply to a civil matter, and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil; and it refused to commit the defendant, a member of Parliament, for his disobedience. The same doctrine was laid down in the other case, where the non-compliance was by a peer.

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But suppose the matter to have been criminal, though without breach of the peace; suppose, for instance, an interruption or obstruction of the Court's business by a man, having privilege of Parliament, getting up and stopping the Court by a long harangue, by ribaldry, by invective, by slander, or by any other indecency which human wit may fancy, or human folly may practice, is it possible to doubt that the Court would order its officer to seize him forthwith and remove and commit him to confinement, as a person who, in the face of the Court, had been guilty of a contempt, of a criminal, and not of a civil kind?§ Indeed if he

[†] 4 R. R. 489 (7 T. R. 448).

[‡] 4 R. R. 410 (7 T. R. 171).

§ A peer refusing to be sworn is

guilty of a contempt for which he may be committed and fined, 2 Salk.

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was merely removed from the Court, that would be enough for the purpose of my argument; because the act of the officer and, consequently, of the Court itself—the bare act of taking the offender and putting him out of Court is as much imprisonment, in contemplation of law, as if he had been thrown into the King's Bench Prison. And if the party is privileged from being sent to prison, he is equally privileged from being turned out of Court. Yet if the Judges had not this power, about 1,100 men would have the right to go and interrupt the business of all the Courts in the kingdom. The business of Licensing Sessions and of Quarter Sessions in the country might be entirely put a stop to by one or two gentlemen in the county, who might happen to take an interest in obstructing the proceedings, and to be clothed with Parliamentary privilege.

But it is not there only that such interruptions may take place. If these privileged individuals choose to *carry their political interference so far, the very business of the Court of Hustings and of the sheriff at elections, where they are not merely supposed but are almost assumed to take a deep interest, may be put an end to; so that, until we come to Parliament itself, we should here have upwards of a thousand persons who would have the absolute right, uncontrolled by any power save that of the Houses to which they belong, of entering, individually or in a body, into those Courts, and not only obstructing all election, but interrupting the administration of all civil and criminal justice.

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Nor is the argument *ab inconvenienti* less applicable to equitable jurisdiction than it is to the other branches of judicature. Who are the persons most likely to be guilty of those very offences which this Court is most frequently called upon to visit with punishment in order to protect its wards? If other Courts have a certain proportion of their suitors in Parliament, this Court, from the importance of the matters brought before it, has a much larger proportion there; and if there be any cases in which members of Parliament—young commoners, and young lords—

hath privilege of peerage or of Parliament against being compelled by process of the Courts in Westminster Hall to pay obedience to a writ of

habeas corpus directed to him." Lords' Journals, vol. xxix. p. 37; *Rex v. Earl Ferrers*, 1 Burr. 631.

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[670] That case may still be supposed in real life which in the most finished part of the most excellent of his works the poet has so admirably described in the history of a travelled and accomplished profligate, of whom, when in the depth of his desperate fortunes,

“Stolen from a duel, followed by a nun,”

it is added, as the means of retrieving him—

“But if a borough choose him, not undone.”

And such are the men whom this arrogated privilege would suffer to enter within the precincts of this high Court of judicature, and to revel in the contempt of the most delicate, the most important of the functions with which it is entrusted.

I have already given a reason why the authority of decided cases in favour of privilege goes for little, if drawn from times when the most extravagant notions of its extent were entertained; but in the same proportion must any decision against privilege in those times be held so much the stronger in behalf of the law's authority. I will only refer to a case in Levinz which seems to me directly in point—a case never contradicted, never over-ruled, and calculated by decision to make an end of the argument. I allude to the case of *Wilkinson v. Boulton*, before the Court of King's Bench, when Lord HALE presided, and reported by Mr. J. Levinz.† To an action for false imprisonment there was pleaded a justification, *under the custom of London for the Mayor and Aldermen to have the custody and guardianship of female orphans till twenty-one or marriage, and for any persons taking such from the guardian appointed by the Mayor and Aldermen, to be brought up before the Court and imprisoned. To this plea there was a demurrer on two grounds, the first of which is only material in so far as it drew from the Court a declaration that the matter was criminal for which the party had been imprisoned. The second ground was that the custom as alleged was ill, “because it is a custom to commit without exception of peers.” This demurrer therefore raised the question

[*671]

† 1 Lev. 162.

WELLESLEY'S
CASE.

distinctly, whether or not a peer could be committed for such contempt of the Court of Aldermen as consisted in taking an orphan out of the custody by them appointed; and the Court held it clear that a "peer is not privileged in this case"—I cite the book—"for in *homine replegiando*, where he detains the body, he shall be committed;" and there was judgment for the defendant, disallowing the demurrer. The authorities cited by the Court are the Year Book 11 Hen. IV. 15, and Fitzherbert's *Natura Brevium*, 68 C. The former was a case of *homine replegiando*, in which the sheriff had returned that the distress had been eloigned; and one point made was, that the party was a peer of the realm, "issint que capias ne gist pas vers lui." But the Court took the distinction I have pursued here, and said "en dett et trespas capias ne gist my vers un Count Baron et hujusmodi; per ceo que pur cause de lour estate, il est entend que ils ont assets, &c.; mes en cest case le tort que el fait, de ce que el ne suffre le replevin estre fait, est le cause que son corps sera pris, de quel estate que il soit;" and reference is made to *Redman's* case, in the time of King Richard. The language of Fitzherbert† is equally precise:—"If there be," says that writer, "an eloignment returned by the sheriff, the plaintiff shall have a *capias in withernam* to take the defendant's body, and to keep the same *quousque* &c., whether he be a peer of the realm or other common person."

[*672]

But I am content to rely on the case itself, decided by Lord HALE, and in the same age to which we owe the Habeas Corpus Act. It is a case peculiarly in point with the present. The authority with which privilege of peerage was assumed by the demurrer to come in conflict, was that of a city Court: the contempt for which it was alleged that privileged persons could not be arrested was taking away a ward of that Court. The Court of King's Bench held that the peerage and its privileges afforded no protection in such a case; and to make the authority more applicable, the Court illustrated the decision by referring to the writ of *homine replegiando*, against which, if a peer was refractory, it was held to be clear that he must be committed; that is, if he eloigned the body of the villein or person sought to be replevied.

† N. B. 155 c.

WELLESLEY'S
CASE.

Now Mr. Long Wellesley has here taken away and detained the ward of this Court; he has eloiigned that ward. Is it saying too much to add that a privilege which could not protect a peer in the time of Charles II. against the authority of the Mayor's Court, is still less capable in the present day of protecting a commoner against the authority of the Great Seal?

[*673]

I have therefore the sanction of *Wilkinson v. Boulton*; I have the authority of the Year Book in the time of Henry IV.; I have the great authority of Fitzherbert, that a peer of the realm as well as any other person shall be committed for obstruction, and contempt in the *nature of obstruction to the process of the King's Courts. You will find moreover that the Star Chamber—I refer to the authority of the Star Chamber reluctantly, but it was a regular Court, and one little likely to err against privilege—that that Court committed a peer of the realm. The peer had disputed its authority; he was committed for an offence in the nature of a contempt, and by a process such as we should use to compel the performance of an act.

Upon the authority, therefore, of all these cases; upon the authority, still higher in my own judgment, of the principle, and upon the reason of the whole matter, the absolute necessity of applying the laws equally to all classes, and the intolerable nuisance which would be suffered, were 1,000 or 1,100 persons to exist in this country placed by privilege of Parliament above the law, and enabled to defy the jurisdiction of all the King's Courts—upon all these grounds, I have no doubt whatever that the distinction here is soundly taken,—not the distinction laid down by Lord Coke of treason, felony, and breach of the peace on the one side, and offences on the other, where no treason, felony, or breach of the peace has been committed—a distinction inconsistent with itself, fruitful of bad consequences, and incapable of being pursued through the authorities; and that the true grounds upon which to rest the case are these two: first, that privilege never extends to protect from punishment, though it may extend to protect from civil process; and, next, that privilege never extends to protect even from civil process where the object of the process is the delivery up of a person wrongfully detained by a party. All the principle, all the authorities, all the reasoning

are in favour of this ground, and it is upon this, and this ground only, that *the jurisdiction of all the Courts can safely and securely rest.

WELLESLEY'S
CASE.
[*674]

The following case, extracted from the Registrar's book, was furnished to the Lord Chancellor by *Mr. Seton*.

MARTIN'S CASE.

A person writing a letter to the Lord Chancellor, relative to a threatened suit, and inclosing a bank note, was held guilty of a contempt, and ordered to attend personally and shew cause why he should not be committed; but afterwards, on his appearing and expressing contrition, he was discharged on payment of costs.

1747.
Aug. 8.
—
Lord
HARDWICKE,
L.C.
[674, n.]

THE Right Honourable the Lord High Chancellor of Great Britain this day taking notice in open Court that his Lordship, on the 2nd of this instant August, had received a letter by the general post, directed to the Right Honourable the Chancellor of England, dated Yarmouth, in Norfolk, 1st August, 1747, signed Thomas Martin, making mention of a bill in Chancery threatened to be filed against the said Thomas Martin, and relating to the subject-matter of such suit, and inclosing a Bank note for 20*l.*, which he thereby desired his Lordship's acceptance of; and the said letter and Bank note, and also the affidavit of J. H., proving the said letter to be the proper handwriting of the said Thomas Martin, being read; this Court, upon taking the said matter into consideration, deeming the contents of the said letter and the sending thereof, with such Bank bill inclosed therein, unto his Lordship, to be a great misbehaviour in the said Thomas Martin, and a contempt of this Court, doth think fit to order that the said Thomas Martin, having personal notice hereof, do shew cause unto this Court, the first General Seal after Michaelmas next, why he should not stand committed to the prison of the Fleet for the said contempt and misbehaviour, and that he do then personally attend this Court; and that the said letter and Bank note of 20*l.* be deposited in the hands of the Registrar, subject to the further order of this Court.—Reg. Lib. B. 1746, fol. 406.

MARTIN'S
CASE.

Nov. 13.

FURTHER ORDER.

[*675, n.]

This Court doth decree that, in consideration of the said Thomas Martin's submission to the Court, and asking pardon for his offence, and of his being now Mayor *of the corporation of Great Yarmouth, and that the commitment of him to the prison of the Fleet might be a prejudice to the public business and affairs of the corporation, the Court doth not think fit to order him to be committed, he consenting, by Mr. H., his clerk in Court, to pay the costs of the order made for him to shew cause why he should not stand committed, and of the execution and service thereof, and that the Bank note for 20*l.* which has been left in the hands of the Registrar be applied and distributed for the relief of such of the poor prisoners in the Fleet prison as are the most proper objects of charity; and doth order that the said Bank note be delivered by the Registrar to the Warden of the Fleet for that purpose, on the behalf of Thomas Martin.—Reg. Lib. B. 1747, fol. 84.

1831.
July 30.

BOYS v. WILLIAMS.†

(2 Russ. & Mylne, 689—699; reversing 3 Sim. 563.)

SHADWELL,
V.-C.
On Appeal.
Lord
BROUGHAM,
L.C.
[689]

A testatrix by a codicil gave to A. and M. “50*l.* each of Bank Long Annuities, now standing in my name.” At the date of the codicil and at her death, she possessed Long Annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted; and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to A. and M. were held not to be specific, but pecuniary.

THE will of Elizabeth Shields bearing date the 9th of December, 1817, after devising her freehold messuages and premises to divers persons therein named, proceeded as follows: “I give unto the nephews and nieces of my late husband 300*l.* stock, 5*l.* per cent. Navy Annuities, to be divided among them in equal shares and proportions. I also give to my cousins Elizabeth Brown, Charlotte Richardson, and Thomas Richards, 200*l.* stock,

† Dist. *Gordon v. Duff* (1861) 3 De G. F. & J. 662, 665.

each, 5*l.* per cent. Navy Annuities. I also give to my relations Jonathan King and Sarah his wife, 200*l.* stock 5*l.* per cent. Navy Annuities; and to my relations David Shore and his brother Samuel 100*l.* each of the like stock." The will then gave legacies of sums of 4*l.* per cent. stock to various individuals and charities, to the amount in all of 1,300*l.* of that stock.

Boys
 v.
 Williams.

The testatrix subsequently made a codicil dated the 6th of April, 1818, which contained the following passage: "Whereas I have, since the executing of my last will and testament, exchanged my 5*l.* per cent. Navy, and 4*l.* per cent. Bank of England stocks, into the Bank of England Long Annuities stock; I do by these presents declare my will to be that all legacies in my will shall be paid out of my present stock, that is to say, the legacies in the Five per cents. Navy, and Four per cents. shall be paid by the same amount in the Long Annuities, 5*l.* per annum for 100*l.* Five cents., and 4*l.* per annum for 100*l.* Four per cents., and in the same proportion for less sums."

[690]

Another codicil, of the 8th of May, 1821, (in the pleadings called the third codicil) made some alterations in the disposition of the real property devised by the will, and concluded in these words: "I likewise give unto Amelia Shields Boys and Mary Boys, daughters of Thomas and Mary Boys, 50*l.*, each, of Bank Long Annuities stock, now standing in my name."

A memorandum, dated the 27th of July, 1827, and also proved as a testamentary paper contained the following passage: "The estate left to Charlotte Richardson to go to Samuel Shore, baker, of Turnham Green, and 100*l.* Bank five per cent. Annuities; to the children of the late Thomas Richards of Isleworth, 10*l.* per annum out of the same stock, to be divided share and share alike; to my servant Elizabeth Chandler the sum of 5*l.* a year for her natural life, out of the same stock. The testatrix died on the 8th of September, 1828.

The question in the cause was, whether the bequests to the plaintiffs, Amelia S. Boys and Mary Boys were *specific legacies of 50*l.* of the testatrix's stock in the Long Annuities, or legacies of 50*l.* sterling charged upon that stock.

[*691]

At the hearing of the cause before the Vice-Chancellor the depositions of Peter Fenn, a clerk in the Bank of England, and

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v.
WILLIAMS.

also of a broker, who spoke to the nature, amount, and market value of the stock standing in the Bank in the testatrix's name, at the several times of the execution of her will and third codicil, and of her death, were tendered in evidence, to shew that the legacies in question to Amelia S. Boys and Mary Boys were not specific but pecuniary.

His Honor rejected these depositions as inadmissible, and decided that the legacies were gifts of so much stock in the Long Annuities;† and the defendants thereupon appealed.

[The LORD CHANCELLOR held that the depositions were admissible in accordance with *Fonnereau v. Poyntz*.‡]

[695] The depositions were then read, from which it appeared that on the 9th of December, 1817, when the testatrix made her will, she possessed 1,560*l.* Navy five per cents. and 1,400*l.* Four per cents. standing in her name, and no other sum of Bank Annuities or Government stock: that on the 8th May, 1821, the date of the third codicil, she possessed the sum of 154*l.* per annum Long Annuities standing in her name, being of the value of 2,887*l.* 10*s.* at the market price of the day, but no other sum of Bank Annuities or Government stock: and that on the 8th of September, 1828, the day of her death, she possessed the sum of 176*l.* per annum Long Annuities standing in her name, being of the value of 3,542*l.*, at the market price of the day, and no other sum of Bank Annuities or Government stock.

Sir E. Sugden and *Mr. Richards* [for the appeal] then submitted, that * * the testatrix must have necessarily meant to give to the Misses Boys a sum of 50*l.* sterling each, out of her Long Annuities. * * *

[696] *Mr. Pepys* and *Mr. Kindersley*, on the other side, contended [that the legacies to the Misses Boys were specific.]

[697] THE LORD CHANCELLOR :

The Court is now called upon to put a construction upon these testamentary papers, with the aid of all the light to be gained

† 3 Sim. 563.

‡ 1 Br. C. C. 478.

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WILLIAMS.

from the knowledge which the testatrix was herself possessed of with respect to her funded property, and which must be presumed to have influenced and guided her at the time when she proceeded to dispose of it. It is vain to say that the evidence shall be let in for one purpose, namely, to shew that these legacies must be specific because there is a fund to answer them, and that it shall not also be received for the purpose of shewing the amount and value of the fund, with a view to the decision of that same question. The cases of *Selwood v. Mildmay*,† and *Fonnereau v. Poyntz* point at no such distinction or restriction; and no such restriction has been suggested by Lord ELDON in *The Attorney-General v. Grote*.‡ If the evidence as to the state and value of the property is to be admitted for one purpose, it must be admitted for all; the principle being, that in order the better to come to a correct conclusion on the whole of the testamentary dispositions, the Court has a right to the assistance to be derived from being placed as much as possible in the position of the testator, so as to see with his eyes and understand his feelings at the time when he exercised his disposing power; and having now the benefit of that assistance I am clearly of opinion that these must be considered as mere pecuniary legacies, intended to be charged upon the stock in question.

It was said with truth that when the legacies are specific, it is a matter of no importance to ascertain what was the value of the fund either at the time of the testator's death or at the date of the will; for all that would result from a deficiency of the fund would be that some parties would go unpaid. But the very question here is, whether the legacies are specific or not; and in determining that question, the Court is clearly called upon to look at the state and amount of the testatrix's property with reference to the provisions contained in the whole of the testamentary papers, and will not lightly assume that she has given legacies without any intention that they should enure for the benefit of the legatees. The Court always leans, where without violence to the words, and in fairness, it can do so, towards such a construction as will make the whole will effectual, rather than

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† 4 R. R. 1 (3 Ves. 306).

‡ *Post*, p. 183.

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to a construction which would render one half or two thirds of its provisions utterly inoperative.

[*699]

Now I desire to know in what respects this case differs from the others in which evidence of the state and value of the property has been received in aid of the construction? It is said that here the probability that these legacies were intended to be pecuniary is not so great as it was in those cases; and it is further said, that the words designating the subject-matter of the gift are stronger and more specific than in them; but I confess I see no substantial distinction between “—l. in Long Annuities to be transferred by my executors to the legatees,” the expression used in *Fonnereau v. Poyntz*, and “50l. each Bank Long Annuities stock now standing in my name,” the expression with which I have here to deal. In both cases equally the testatrix appears to me to be plainly dealing with her own fund, and that a fund which she conceived she then had in her possession. The same observation appears to have occurred to Lord *ELDON in *The Attorney-General v. Grote* with respect to the expression “further part of my stock,” as indicating an impression on the mind of the testatrix that she was dealing with stock which she then actually had. That expression appears to me to be quite as strong in favour of holding the legacy there given to be specific, as any words which are to be found in this will. Nevertheless Lord ELDON, upon the effect of that expression, considered in connection with the rest of the will, and as elucidated by the evidence with respect to the state and value of the property, determined that the legacies of so much of the testatrix’s Long Annuities stock were to be construed as mere money legacies charged upon that stock.

Any intimation which his Honor may have thrown out, as to what his opinion might have been if the evidence were admitted, must have been entirely extra-judicial.

Judgment reversed.†

† Reg. Lib. A. 1830, fol. 2956.

ATTORNEY-GENERAL *v.* GROTE.†

(3 Merivale, 316—321; Reversed on appeal, 2 Russ. & Mylne, 699—702.)

Legacy of “100*l.* Long Annuities stock” held, upon the context of the will and the terms of the gift as compared with those of the other bequests, and upon the evidence of the state of the funded property, to be pecuniary and not specific.

1817.
July 21, 22.

Rolls Court.
GRANT, M.R.

On Appeal.
1827.

Lord ELDON,
L.C.

[3 Mer. 316]

LETITIA PITTS being possessed of a considerable personal estate, and (amongst other things) of monies in the public stocks, and in particular of Long Annuities to the amount of about 400*l.* a year, duly made her last will dated the 30th of December, 1805, whereby, after appointing certain persons to be trustees of her will, she proceeded to the effect following: “I give and bequeath to the minister and churchwardens of the parish of Great Brick Hill in the county of Bucks 5*l.* per annum Bank Long Annuities, and I give to the minister *and churchwardens of the parish of Wargrave 5*l.* per annum like Bank Annuities, in trust for the poor of their respective parishes, and to be laid out for them in bread or meat every half-year when and as the dividends or yearly proceeds thereof shall become due and payable; and I give and bequeath to the Treasurer for the time being of Saint Bartholomew’s Hospital in London, and to the Treasurer for the time being of the Foundling Hospital near Queen Square, London, 100*l.* Long Annuities stock, each, to be applied for the use and benefit of the said respective Hospitals; and I give to the Governors for the time being of the Charity School of Saint George the Martyr, Queen Square, 100*l.* Long Annuities stock, to be applied for the use and benefit of that charity. I give and bequeath 30*l.* per annum, further part of my Bank Long Annuities, in trust to receive and apply the dividends and yearly proceeds thereof to and for the use of Letitia Deighton, spinster, until she attain her age of twenty-one years, and, when and so soon as she shall attain that age, then upon trust to transfer the said 30*l.* per annum Bank Long Annuities unto the said Letitia Deighton to and for her own use and benefit; but in case the said Letitia Deighton should depart this life before she attains her said age of twenty-one years, then upon trust that my said trustees or the

[*317]

† See the preceding case.

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v.
GROTE.

survivor of them do and shall transfer the said sum of 30*l.* per annum Bank Long Annuities unto the said Mr. William Culverden, his executors and administrators, to and for his and their own use and benefit; and I give unto the before-named Mr. W. Culverden 150*l.* Bank Long Annuities stock, and I give Mrs. Culverden 20*l.* for mourning; and I also give and bequeath 10*l.* per annum, further part of my Bank Long Annuities, in trust to pay the dividends and yearly proceeds thereof to Mrs. Hannah Gearing (who *lived in my service many years) and her assigns, for and during the term of her life; and I desire that all my legacies, debts, and funeral expenses may be paid within one month after my decease, or bear interest at 5*l.* per cent. per annum after that time, until they are discharged." That the testatrix afterwards made the following codicil to her will: "And I give and bequeath to Mr. William Culverden a further sum of 100*l.*, I have before bequeathed him in my will. And whereas I may have made a wrong calculation of the value of my fortune in the funds at the uncertain price they may be at the time of my decease, I will and direct that, if there should be any deficiency, it may be deducted out of the residue of my personal estate, as I would have all the legacies and bequests paid to the full."

[*318]

The information, filed at the relation of the Treasurer of the Charity School of St. George the Martyr, claimed on behalf of the charity a legacy of 100*l.* Long Annuities stock.

The defendant Grote (who had taken out administration, with the will annexed) by his answer, stated that the testatrix was at the time of her death possessed of 385*l.* per annum Bank Long Annuities, but to no other monies in any of the public funds; and that, exclusive of the said Long Annuities, the personal estate was by no means sufficient to satisfy her funeral and testamentary expenses and debts. He submitted that, according to the true construction of the will, and under the circumstances aforesaid, such legacy was not to be considered as a specific bequest of 100*l.* per annum Long Annuities, part of the Long Annuities standing in the name of the said testatrix at the time of her death, but that the charity was entitled to so much only of the *said stock as by a sale thereof would raise the sum of 100*l.*

[*319]

Bell and Roupell, for the information.

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r.
GROTE.

Hart and Palmer, for the defendants, cited *Kirby v. Potter*,† and *Fonnereau v. Pointz*.‡

THE MASTER OF THE ROLLS [held that the legacies were specific bequests].

This case was argued on appeal before Lord Eldon, who had not pronounced judgment at the time when he resigned the Great Seal; but the following written opinion was afterwards delivered out by his Lordship, the parties having consented to accept it as his judgment:

1827.
[2 R. & M.
699]

“I have very frequently given my attention to this case, and I have no hesitation in stating that I have often changed my opinion upon it. To say that I have never been able, to my own satisfaction, to reconcile the decisions to be found in the books upon cases which involve similar questions, is only to repeat what I have often stated in Court. The difficulties in this case are probably considerably increased by the Judge’s being obliged to take the will and codicil as they are to be found in the probate, although it is very possible that their contents, when the testatrix made them, might influence the construction of such parts as must now be taken to be the whole of the will and codicil.

[700]

“I think there is evidence upon the face of the will that the testatrix meant the legacies which she connects with the word ‘stock’ to be legacies of stock which she had. She uses the expression ‘further parts of my stock;’ and where the testatrix uses the expression ‘my stock,’ I conceive she means to give what she has.

“The question is whether, where she gives 100*l.* Long Annuities stock, she means the same as if she had given 100*l.* per annum Long Annuities. It is difficult to get rid of a strong impression which the repeated variations of the terms ‘gifts of —*l.* per annum Bank Long Annuities,’ and of the terms ‘100*l.* Long

† 4 R. R. 342 (4 Ves. 748).

v. *Leapingwell*, 11 R. R. 234 (18 Ves.

1 Br. C. C. 472. And see *Page* 463).

ATT.-GEN.
v.
GROTE.

Annuities stock,' to be found in this will, create in the mind of a person reading the will. It is difficult to conceive that the testatrix really meant the same thing in both cases. But individual belief ought not to govern the case; it must be judicial persuasion.

[*701]

"Parol evidence, if there were any, of what the testatrix meant, will not do. In *Stafford v. Horton*,† as I *understand it, parol evidence, or what could only have been proved by parol declarations, was held not to be admissible to control the words of the will. After frequently changing my opinion upon the present case, as I apprehend evidence of the state of the funded property of the testatrix may be resorted to, I have come to the conclusion that there is enough in the terms of the gift and the state of the property, taken together, to authorise a Court in saying, that the 100*l.* were not to be 100*l.* per annum, but so much stock as would be sufficient to pay 100*l.* Those terms and that state, taken together, seem to me to authorise this construction of the legacies, as reasonably as any words in *Fonnereau v. Poyntz* authorised a limited construction of sums in Long Annuities in that case.

"This is the opinion I have finally formed after giving repeated attention to every part of the gifts in, and contents of the will and codicil, and to all the reasoning I have met with in reports. That this is a very doubtful case, and that therefore no opinion of mine upon it, or, as I think, of any body, can be justly represented as unquestionably right, I admit; but such as my opinion is, I have stated it. If it is acted upon, the legacy in question is 100*l.* and not 100*l.* per annum."

MOYLE v. MOYLE.

(2 Russ. & Mylne, 710—716.)

1831.

Aug. 11, 12,
15.

LEACH, M.R.
On Appeal.
Lord
BROUGHAM,
L.C.
[710]

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss.

THE testator, John Moyle, gave the residue of his personal estate and effects to the defendants, Charles Moyle, John Smith,

† 1 Br. C. C. 482.

and Robert Corser, his trustees and executors, upon trust, with all convenient speed, to call in his debts, and to sell and convert into money such parts of his personal estate as should not consist of money, and thereout to satisfy his debts and legacies, and subject thereto, upon trust, to invest the clear surplus in the purchase of Three per cent. Consols, or some other of the Parliamentary stocks, and to apply the dividends, or so much thereof as should be necessary, towards the maintenance and education of his daughter, until her age of twenty-one or marriage; and afterwards, upon trust, to transfer the principal to her for own use; with a bequest over, in the event of her dying under that age and unmarried, to his brother and sister equally. The will further directed that any surplus of interest beyond what was required for the maintenance of the daughter, should be, from time to time, invested in the same stock and added to the principal. It also contained the usual clauses, that the trustees should be liable each for his own acts and default only, and that they should not be answerable for more of the trust-monies than should come to their hands respectively; nor for any loss or damage which might happen without their wilful default, or by the misfeasance, failure, or insolvency of any banker, with whom the trust-monies might be lodged for safe custody or investment, or otherwise in the execution of the trusts.

MOYLE
r.
MOYLE.

The testator died in the month of June, 1823. In the month of October, in the same year, the bill was filed by his infant daughter, by her mother and next friend, praying to have the accounts of the estate taken, and the plaintiff's rights under the will ascertained and secured. In March, 1824, the defendants, the trustees and executors, put in their answer. A motion, against them, in the following May, that they might pay into Court a balance of 260*l.*, appearing by their answer to be then in their hands, was refused; and on the 29th of January, 1825, the usual decree was made.

[711]

When the Master made his report, an exception was taken to it, by the trustees and executors, on the ground that they were thereby charged with a sum of 928*l.*, which they had claimed to be allowed in their discharge. The sum in question belonged to

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MOYLE.

the testator's estate, and was the amount of a balance which was lying in the hands of Messrs. Sikes & Co., bankers, of London, on the 18th of December, 1825, the day on which that house stopped payment. It appeared that Sikes & Co. had been the testator's bankers, and that, after his death, they continued to be employed as the bankers of the trust-estate. One of the trustees and executors was the testator's brother, to whom a moiety of the residuary property was given over, absolutely, in the event of the plaintiff dying under age and unmarried.

The MASTER OF THE ROLLS made an order, allowing the exception; and the plaintiff appealed to the Lord Chancellor.

Sir E. Sugden and Mr. Walker, for the appeal.

The *Solicitor-General* and *Mr. James*, for the exception.

[712] The particular circumstances of the case and the principal arguments urged in support of the exception, are stated and considered in the judgment. * * *

Aug. 15.

THE LORD CHANCELLOR (after stating the will) :

The testator died in the same month in which he made the will. A bill was speedily filed for the administration of his estate; and in the course of the proceedings in that suit, and in the month of May, 1824, a sum of 260*l.* being then in the hands of the defendants, the executors, a motion was made by the plaintiff to have that sum paid into Court. The motion was successfully resisted; partly because it appeared that a year had not elapsed from the time of the testator's death, and partly, also, because the sum was in itself so inconsiderable in amount. A decree was eventually obtained in January, 1825; nearly a twelvemonth—upon the lapse of which the present question principally arises—was then suffered to pass; and late in the same year (1825) Messrs. Sikes & Co. failed, with the money (which had now been increased to 900*l.* and upwards) in their hands; and the question is whether the loss consequent upon that failure, shall fall on the executors or on the residuary legatee.

As there is a *primâ facie* case in which it was the duty of the executors to have invested the fund with all convenient speed, or, at all events, immediately after the decree in 1825, the question is whether they have shewn a case which is sufficient to excuse them for having neglected so to do.

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The first excuse they set up is that there was an unfortunate lease of premises in the city, occupied as an oyster shop: this lease had been assigned by the testator without taking a covenant from the assignee to relieve him from liability for the rent, which amounted to 100*l.* a year, and without any reservation of a power of re-entry in case of non-payment. It is further alleged, that the premises were in a dilapidated state, and that the tenant used to shut up the lower part of the house, and occupy the upper story; and that it was at certain seasons only that he could make any payments towards the rent at all. For these reasons it was contended that the trustees were under the necessity of keeping a considerable balance in their hands. There can be no doubt, however, that if the defendants, after paying the money into Court, had been called upon by an action brought by the superior landlord for the rent, this Court, having then the possession of the fund, would have interfered for their protection; or would, upon their application, have made an immediate order, placing at their disposal the necessary sum to meet the landlord's demand. But there was no necessity for paying the money into Court. If they had merely invested it, that would have been sufficient; and the greater the prospect of their liability to pay the rent, the more incumbent was it upon them to render the fund productive in the mean time, by investing it in such a manner as to yield a profitable return.

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The next excuse set up was that several letters were written by the solicitor of the executors, Mr. Bolton, to the solicitors of Mrs. Moyle, pressing them to consult with their client to come to some arrangement, chiefly indeed respecting the lease, one or two of them, however, with respect to the fund lying unproductive. The letters shew undoubtedly that there was a certain disposition to invest *the money, which does not seem to have been properly met on the other side; for no answer appears to have been returned to these proposals. But the executors ought to have

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known that it was not necessary to have any conference or arrangement, or any consent on the part of the plaintiff to the investment, and that they might either by a common order have had the fund paid into Court in the cause, or without such an order, on their own authority, have invested it in their own names. But it does appear from the correspondence, on looking into it more narrowly, that there was some disinclination and opposition to payment of the money. In a letter written in February, 1825, Mr. Corser expresses himself thus, "No money will be paid so long as that lease subsists." Now, why the executors should retain more than one year's rent I am at a loss to understand: such an expression shews that it was not altogether from omission or mere laches, but rather from an ill considered view of what they thought necessary to their own security, that they refrained from investing the money. And Mr. Bolton's letter assigns the lease as a reason why he will oppose, as his clients had all along resisted, and successfully resisted, any attempt to make them pay it into Court.

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In the course of the argument it was asked, why the executors did not at the very commencement of the panic, which lasted for several days, take instant and active steps for drawing out the assets in the bankers' hands and paying them into Court. In answer it was said they could not do so, because an arrangement had been made for security's sake, that they should all concur in signing the cheques; and that one of their number, Mr. Smith, having failed in the preceding September, he was out of the way at the time. This might have been a satisfactory answer, if it had been borne out by the facts. *But the affidavit swears very cautiously as to Smith being out of the way, and does not state that he was out of the way except at the end of the year. Besides, the arrangement is distinctly sworn to have been, not that all the three, but that two out of the three should concur in signing the cheques. Now Corser lived in London, and Charles Moyle in Shropshire; and the former might at least have made the attempt of writing on the Monday, the day on which the panic began; but no attempt was made.

Taking the whole of these circumstances into my consideration, it is impossible for me to hold, that the trustees have sufficiently

shewn that there was no laches on their part. To permit such laxity would be most dangerous. A man may renounce a trust, or he may refuse to undertake it, but having once accepted it, whether as executor or as trustee, he must discharge its duties, so long as his character of trustee subsists; for, by consenting to assume the office, he prevents other persons from being appointed, or accepting, who might have more time and leisure to devote to it. It is no excuse, therefore, that the parties are volunteers; for they are greatly to blame in consenting to act, if they really have not time for the due performance of their duty, and injury is sustained in consequence.

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In this case it is clear that, if these executors had been acting in their own affairs, they would not have allowed so large a sum to lie unproductive in the hands of a banker, exposed to the hazard of his failure. If they had entertained any doubt with respect to the necessity for a conference, they might have taken the advice of their solicitor, or have applied to counsel.

What pressed me most at the hearing was the argument as to the apportionment of the liability. It was argued that in any event 260*l.* was held, on the motion, not to be too much for the executors to retain. True, it was not so considered within a year after the testator's death; and the Court might then well say it was not worth while to order them to pay in the money when the whole sum in hand was so small. But if it had been so large in amount as the sum now in question, the Court would no doubt have acted differently, and would have said at once, You must invest the whole. They were not in my opinion justified in retaining it; and it would be giving a most dangerous latitude to allow executors to defend themselves by saying, "We were afraid that blame would be cast on us in case the price of stocks fell;" an apprehension quite unreasonable and absurd; for no one could have justly censured them. It is to be observed, besides, that if the Court had directed an investment, it would have ordered the whole, and not merely a part, to be invested.

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For these reasons I am of opinion that the order of his Honor, allowing the exception, should be reversed, and that the

Exception must be over-ruled.

ATTORNEY-GENERAL *v.* SMYTHIES.

(2 Russ. & Mylne, 717—750; S. C. Coop. temp. Brough. 5; 2 L. J. (N.S.) Ch. 58.)

1831.

Nov. 18.

Rolls Court.

LEACH, M.R.

On Appeal.

1832.

Dec. 6, 7.

1833.

Jan. 15, 29.

Lord
BROUGHAM,

L.C.

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By letters patent of King James I. a charitable corporation was created by the name of the Master and Poor of the College or Hospital of King James, in the suburbs of Colchester, to consist of a master and five poor persons; and lands were granted to the corporation, with a direction that 52*s.* yearly should be paid to each of the five poor persons for their support and maintenance; and it was ordained that the income and revenues of the lands so granted should be expended for the support of the master and poor of the hospital, and for the maintenance and repairs of the buildings and possessions of the hospital. Under the particular provisions of the letters patent, it was held at the Rolls, that the five poor persons were entitled to share with the master in the increased revenue of the charity lands; but this decision was reversed on appeal.

The master having, in virtue of an agreement with the Comptroller of the Barrack Office, derived a profit upon the sale of the materials of certain barracks which under a lease from the master had been erected on part of the charity lands; it was held, that inasmuch as this agreement, so far as the master was a party to it, grew out of and was incidental to his official situation, the profit was not personal to the master, but was received by him in trust for the charity.

By letters patent, which were in the Latin language, and were dated the 9th of October in the eighth year of the reign of King James I., [after reciting that his Majesty was desirous to provide for the foundation and perpetual relief and support of the said college or hospital, and of the master and poor who should be maintained in the same, it was ordained] and granted that, from thenceforth and for ever, there should be one college or hospital of the poor, in the suburbs of the town of Colchester, for the relief or maintenance of the poor, that should exist for ever, and be called the College or Hospital of King James in the suburbs of the town of Colchester; that it should consist for ever of one master and five poor: and in order that his Majesty's aforesaid intention might the better take effect, and that the goods, lands, tenements, incomes, revenues, and other hereditaments which had been granted and assigned for the perpetual support of the said college or hospital might be better governed and expended for the support and maintenance of the master and poor of the said college or hospital, and for the preservation of the said college or hospital for ever, it was thereby further ordained, that thenceforth and for ever there should be

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one master of the said college or hospital, and of the goods, chattels, lands, and other possessions thereof, and that he should have the care of the souls of the parishioners of the parish of St. Mary Magdalen, in the town of Colchester, and he should there celebrate divine service; he should faithfully preach the word of God, and he should administer the sacrament in due manner, either by himself or by some sufficient minister or curate; and *further that there should be five poor persons who alone, either men or women, should be supported, relieved, and maintained in the said college or hospital; and they should be called the poor of the College or Hospital of King James in the suburbs of the town of Colchester; and for their support, relief, and maintenance, they should have, enjoy, and receive through the hands of the said master for the time being, or of his assignees, annually, 52s., which should be paid to the same poor by the same master for the time being, or by his assignees, by equal quarterly payments of 13s. each, at the four usual feasts, to be paid for ever yearly to each of the said poor. And his Majesty thereby appointed Henry Davye, one of his chaplains, to be the first master of the said college or hospital, and of all the lands, manors, hereditaments, and possessions thereof; commanding that the same Henry Davye, so long as he should remain in the office of master, should faithfully and diligently celebrate divine service, should preach the word of God and administer the sacrament, either by himself or by a sufficient deputy, as well to the poor of the college or hospital, as to the parishioners of the parish of St. Mary Magdalen in Colchester, in the parish church of St. Mary Magdalen aforesaid, adjoining to the said college or hospital; and his Majesty thereby also appointed the five persons therein named to be the first poor of the said college or hospital, to continue in the same during the term of their natural lives, unless in the meantime for any reasonable cause they or any of them should be removed: and his Majesty willed that these poor should be removed by the master of the said college or hospital as often as the case should require: and it was his Majesty's further will and pleasure that, whenever it should happen that any one or more of the said five poor should die or be removed *from the college or hospital, it should then

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be lawful for the said Henry Davye, and for his successors the masters for the time being, to elect and appoint one or more others in the place of him or them so happening to die or be removed, to supply the aforesaid number of five poor. And his Majesty thereby further granted and ordained that the said master and poor of the said college or hospital, and their successors thenceforth for ever, should be and they were thereby created and constituted a body corporate and politic, by the name of "the master and poor of the college or hospital of King James, in the suburbs of the town of Colchester." And his Majesty thereby further ordained that the chancellor or keeper of the great seal of England for the time being, should be visitor of the said college or hospital, and should from time to time, and as often as might be necessary, inspect and visit the same, and the master and poor of the college, and the state, order, and government thereof; and that as often as the master of the college or hospital should die or be removed from his office, it should be lawful for the visitor for the time being to appoint a fit, sufficient, and honest person to be such master. And the master of the said college or hospital for the time being was thereby authorised and empowered, with the consent of the attorney-general and solicitor-general for the time being, or either of them, to make, ordain, and establish good, useful, and wholesome statutes, laws, and ordinances in writing, touching the government, election, expulsion, punishment, order, and direction of the master and poor of the college, and to appoint any other things whatever concerning the college, and the ordering and disposal of the goods, rents, revenues, and possessions thereof; which statutes, laws, and ordinances his Majesty thereby enjoined to be inviolably observed for ever.

[*721] And it was thereby further *ordained, that the income and revenues of all the manors, lands, hereditaments, and possessions, which had been theretofore or should thereafter be given to the perpetual support and maintenance of the said college or hospital, should be disposed of and expended for the support of the master and poor of the college or hospital for the time being, and for the support, maintenance, and repairs of the houses, tenements, and possessions of the college or hospital,

according to the statutes, laws, and ordinances aforesaid, and for no other uses or purposes whatsoever.

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SMYTHIES.

By virtue of the power conferred in the letters patent, Henry Davye, the first master of the hospital, with the consent of Sir Francis Bacon, then Attorney-General of his Majesty King James I.. drew up and published a body of laws and statutes, for the regulation of the hospital and its members. These laws and statutes had reference principally to the powers and duties of the master, in nominating, governing, controlling, and removing the five poor persons, and in managing the concerns and property of the hospital; but partly also to the conduct and obligations of the poor. Among other things it was thereby declared, that the master, to the best of his power, should maintain the rights and privileges of the hospital, and not demise the possessions or revenues of the same; and should keep and maintain all the houses and buildings of the hospital well and sufficiently repaired, so that they might be fit and convenient for the habitation of the master and poor; that he should not make any demise or grant of a field called Magdalen, nor of the woods in the parish of Layer de la Haye, but only such as should determine and cease, by the death of the master who should make the same. That he should provide and maintain one strong chest, continually to stand in the hospital house belonging to the said master, *where he should keep his Majesty's letters patent of the foundation, as also the common seal, and all the evidences and writings of the hospital, and should likewise provide and maintain one register book, to be kept in the said chest, wherein he should register from time to time the names of the poor, and the day and year of their election; and therein should be set down the names of the several lands belonging to the hospital, and where the same lay, and such other matters as to his knowledge should tend to preserve the privileges, rights, and possessions of the hospital. And it was also thereby declared, that the poor of the said hospital should diligently and frequently hear divine service and sermons, in the parish church of Mary Magdalen, in Colchester, and should receive the sacrament there four times in the year, at the least: that they should be obedient to the master in all things lawful and convenient, and should, to

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the best of their power, maintain the rights and privileges of the hospital: that they should reside in their several houses that should be appointed unto them by the master; and none of them should lodge a-night elsewhere without the licence of the master or his deputy, or some reasonable cause to be allowed by him; neither should they receive any person to lodge a-night in any of their houses, without the special licence of the master or his deputy.

The annual income derived from the property and possessions of the hospital had greatly increased of late years, and now amounted to 350*l.* and upwards, but no increase had been at any time made in the yearly payment of 52*s.* to each of the five poor persons; and the whole revenue of the charity, after satisfying those five yearly payments, had, from the time when the hospital was established, been uniformly received and applied by the master for the time being to his own use.

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In the years 1796 and 1797 respectively, two leases of parts of the charity lands were granted by the then master of the college to the officers of the board of ordnance, for the terms of 21 years, each, at certain rents, for the purpose of building barracks; and those leases contained covenants that, at the expiration of the respective terms, the officers of the board of ordnance should be at liberty to remove all buildings which should be erected on the demised lands, they filling up all the holes and levelling the ground, and also twice ploughing the lands full eight inches deep, and paying a fine to the master and poor of the college of two years' rent of the premises.

After the expiration of these two leases, and on the 18th of May, 1818, an agreement was entered into between the defendant, who had then become master of the college, and the comptroller of the barrack office, by which it was provided that the whole of the barrack buildings erected on the premises which had been so demised should be sold by auction; and that one moiety of the sum to be produced by such sale should be appropriated, first, in paying to the defendant, as master of the college, two sums of 60*l.* 18*s.* and 83*l.* 10*s.*, being the fines covenanted to be paid at the expiration of the leases; and then, that the residue of such moiety should be received by the defendant, in consideration of

his filling up the holes and levelling the ground and ploughing it in the manner covenanted to be performed as aforesaid by the lessees, and also as a full compensation and satisfaction for the injury which had been done to the land comprised in the two leases, or to the soil thereof, by reason of the barracks and other buildings having been erected and built thereon.

In pursuance of this agreement, the barrack buildings were pulled down and the materials sold; and the moiety *of the proceeds, which was paid to the defendant, exceeded the sum of 5,000*l.*, the whole of which, after defraying the expenses of filling up the holes and levelling and ploughing the ground, the defendant treated as his own private property, and applied to his own use. [*724]

The information, which was filed against the Rev. John Robert Smythies, the present master of the college, after setting forth the letters patent, and stating the facts before mentioned, went on to charge that, in consequence of the great rise in the price of provisions, the yearly allowance of 52*s.* each had become wholly inadequate to the support and maintenance of the poor belonging to the hospital, and that some of them were then in the receipt of parochial relief; that in consequence of the length of time which had elapsed since the foundation of the charity, and the augmented value of the estates, the yearly allowance to the five poor persons ought to be increased so as to be adequate to their support and maintenance. It further charged that the defendant had for many years resided at Leominster in Herefordshire, and that he only visited Colchester occasionally, for the purpose of receiving the rents of the estate, contrary to the directions contained in the letters patent; and it prayed that an account might be taken of the charity estates, and of all sums of money received by the defendant in respect of the same; and that it might be referred to the Master to inquire and state what, if anything, ought to be allowed for the increase of the maintenance of the five poor persons; and also to consider and approve of a scheme for their future support and maintenance.

The defendant, by his answer, admitted that his ordinary and permanent residence was at Leominster, and that he only visited

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Colchester occasionally, for the purpose of looking after the management of the hospital *and its estates; and further that he had received, after deducting expenses, a clear sum of 5,000*l.* from one moiety of the proceeds of the sale of the barrack materials.

June 9.
—

A motion that the defendant might be ordered to pay this sum into Court was resisted upon the ground that the fund in question was not trust-money belonging to the charity, but was rather to be regarded as in the nature of a windfall; and that to make such an order now would be virtually to decide the question of right upon an interlocutory application.

The LORD CHANCELLOR refused the motion, observing that the question whether the 5,000*l.* were to be considered as in the nature of profit or a windfall, the view to which he at present rather inclined, or as forming part of the capital stock of the charity, was proper to be discussed and determined at the hearing; and that nothing appeared to shew that the fund was exposed to any danger by being left till then in the hands of the defendant.

Nov. 18.
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At the hearing of the cause before Sir John Leach, Master of the Rolls, two questions were raised; first, whether the master was exclusively entitled to the surplus revenues of the charity property, after paying the yearly sums of 52*s.* each to the five poor persons, or whether the five poor persons ought not to share in the increased rents of the charity estate; and secondly, whether the moiety of the proceeds, received by the defendant from the sale of the barrack buildings, after deducting the expenses incurred by the defendant in filling up the holes and levelling and ploughing the ground, was or was not to be considered as trust-money belonging to the charity.

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Mr. Pemberton and *Mr. Skirrow*, in support of the information.

Mr. Bickersteth and *Mr. Spence*, for the defendant, the master of the hospital.

THE MASTER OF THE ROLLS :

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This appears to me to be a case that admits of very little doubt. It is truly stated that it is a new case, and I do not recollect that a similar case has been brought before the Court. In other cases the question has been whether the revenues of the property were to be applied wholly to the charitable purposes expressed in the letters patent, or whether the corporation to whom the property was given were to enjoy the surplus revenue which should remain after the payment of certain specified sums.

In this case it is clear, and is admitted, that the whole revenue is to be applied to the charitable uses expressed in the letters patent ; and the question is, whether the benefit of the increased value of the property is to accrue wholly for the benefit of the master, or is to any extent to be shared by the five poor persons. The increase of the income of the charity estates, not being contemplated at the time of the letters patent, is not therein expressly provided for ; and the provisions of the letters patent are therefore to be carefully examined, in order to see whether the general intention of King James can have effect, if the whole benefit of the increase is confined to the master.

In the first place it is to be observed, that the new corporation is declared to be capable of acquiring lands and tenements for the support, relief, and maintenance *of the master and poor ; and it is afterwards ordered and enjoined that all the income and revenues of the lands then given and thereafter to be acquired, shall be disposed of and expended for the support of the master and poor ; and it is, therefore, not reasonable to presume an intention on the part of King James that the master alone should have the benefit of all future grants. But the most material consideration is that it is apparent upon the letters patent that it was the intention of the King that the five poor persons should be wholly maintained and supported out of the revenues of the charity, and that the yearly sum of 52*s.* for each is therein mentioned as a sum which was, at that time, adequate to such support and maintenance ; and there is an express authority given to the master, with the consent of the Attorney-General and Solicitor-General, from time to time to make statutes and ordinances, and among other things, touching

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SMYTHIES.

the ordering and regulation and disposal of the goods, possessions, rents, and revenues of the college. Under this authority the general intention of the King to provide for the full support and maintenance of the five poor persons out of the revenues of the charity might and ought to have been carried into effect, and may now be enforced by this Court.

[*723] With respect to the sum received by the defendant under his agreement with the comptroller of the barrack office, it is plain that this agreement grew out of the situation of the defendant as master of the college, it being provided by the agreement that the rents due to the college shall be paid to him, and one part of the agreement being in consideration of the injury which had been done to the soil of the charity property by the building of the barracks. From a dealing in this character, the defendant, upon the settled principles of *a court of equity, cannot claim the profit as a personal benefit, and he must account as a trustee for the charity for the amount received by him under the agreement; but inasmuch as no statute or ordinance has been hitherto made for depriving the master of the surplus revenue, after the payment of the five yearly sums of 52*s.*, the defendant will, up to this time, be entitled to the interest of what shall be found due from him upon that account. * * *

1832.
Dec. 6, 7.
[729]

The defendant presented a petition of appeal against his Honor's decree.

The appeal came on to be heard before the Lord Chancellor in the month of December, 1832, when it was argued by *Mr. Spence* and *Mr. Rudall*, for the appellant, and by *Mr. O. Anderdon*, for the relators.

The LORD CHANCELLOR said he was disposed to concur in the view taken by the MASTER OF THE ROLLS as to that part of the decree which declared that the money received from the proceeds of the sale of the barrack materials formed part of the charity property; but on the other and more important question raised, with respect to the right of the almsmen to share with the master in the increased revenues of the hospital, he entertained considerable doubt. It would, therefore, be very satisfactory to

him to have the case further considered and discussed with reference to that point.

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SMYTHIES.

It was finally arranged, that the question should be re-argued by one counsel on each side.

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Sir E. Sugden, in support of the decree, [relied mainly upon *Arnold v. The Attorney-General*† and the *Thetford School* case.‡]

1893.
Jan. 13.
—

Mr. Pepys, *contrà*, [cited *The Attorney-General v. The Mayor of Bristol*§ and *The Attorney-General v. The Skinners' Company*.:]

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Sir E. Sugden, in reply, observed that the case of the *Corporation of Bristol* had no analogy; for, in that case, the claim made to the surplus, and to the justice of which Lord ELDON acceded, was set up by the whole corporation who constituted the trustees, and not, as in this case, by one individual member of it only. With respect to the objection grounded on the alleged interference of the suit with the functions of the visitor, it *was perfectly clear that a visitor had no authority to order a new distribution and apportionment of the charity revenues, which it was the object of the present information to obtain, and which it was competent to the LORD CHANCELLOR, only by virtue of his general jurisdiction, as presiding over all the charitable foundations in the kingdom, and in no other character, to direct.

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THE LORD CHANCELLOR:

Jan. 29.
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When this appeal was originally before me, it seemed to involve a question of so much importance and novelty as to justify me in directing it to be again argued by one counsel on each side; and having had the benefit of that second argument, I have now to state the result of the best attention which I have been able to bestow upon the case.

With respect to the 5,000*l.* arising from the transaction

† Show. P. C. 22.

3 Madd. 319).

‡ 8 Co. Rep. 130.

|| 26 R. R. 126 (2 Russ. 407).

§ 22 R. R. 136 (2 J. & W. 294,

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r.
SMYTHIES.

[*739]

between the master of the hospital and the officers of the barrack department, I felt disposed on the hearing of the motion in June, 1831, to look upon that sum as being in the nature of a windfall, which the master might appropriate to his own use, without applying any portion of it to the benefit of the hospital. But having now had an opportunity of more deliberately examining and considering the facts, I have come to the conclusion that this sum must be treated as forming part of the *corpus* of the charity estate; but that the master will nevertheless be entitled to enjoy his share of the annual profits of it, so long as he continues to fill the office of master. Without going further into the argument upon that point, I think it sufficient to observe that I entirely concur in what *seems to have been the view upon which this part of his Honor's judgment proceeded: for inasmuch as the buildings were erected on land belonging to the hospital, and, but for the arrangement made with the barrack office, must themselves eventually have become the property of the hospital, and in that case might have proved greatly more valuable than the sum that has been received in lieu of them, the master, when he took upon himself to enter into the arrangement, must necessarily be presumed to have been dealing in his official capacity, and as a trustee for the hospital; and whatever sum, therefore, he may have realised by means of such dealing must be considered as a trust fund for which he is accountable to the charity estate.

But the other and more important question remains to be disposed of, and upon that I have the misfortune to differ with his Honor; I mean the question with respect to the construction of the deed of endowment, and the right claimed by the almsmen under it, to participate proportionally with the master in the increased income of the charity.

[After referring to the letters patent] his Lordship continued:
[740] There being then no dispute that the whole is given to the charity, the question is whether the estate is given to the body, consisting of the master and almsmen, subject to a yearly payment of 52s. to the almsmen, or to the master and almsmen; in other words, whether the surplus shall go to the master, whose share is not fixed, or between him and the almsmen, notwith-

standing that there appears an intent to fix and limit the shares of those almsmen.

ATT.-GEN.
C.
SMYTHIES.

Let us first ask (as it is always right to do where no fixed rule of law prevails) what is the plain and natural sense of such a gift. If I give the whole of an estate, and other funds, to several objects, and mention the proportions in which each shall take, no difficulty arises; they are to divide the whole in those proportions. So, if without expressly stating that it shall be so divided, I so frame the gift that no reasonable doubt can be entertained of such being my intention, it is the same thing. One most important indication of this intention *is, when particular amounts are given to the different objects, and the whole shares taken together exhaust the fund. This is, in fact, the *Thetford School* case,[†] supposing the gift there had been directly to the objects of the donor's bounty and no feoffees had been interposed; for, as that case stands, a question in later times might have arisen as to a resulting trust. This, at least, was Lord HARDWICKE's, and appears to have been Lord ELDON's opinion. But suppose the gift to be framed quite otherwise, and instead of expressly apportioning the whole, or impliedly apportioning it, as by exhaustion or other indication of such an intention, the fund is given entirely to one body, subject to a certain payment to other parties, the latter can only take what is given, as a charge, and the surplus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention. Nor is there any particular form in which alone the one object of the donor's bounty can be made the primary or principal donee, and the other only the secondary donee, or, as it were, the incumbrancer upon the fund. If the gift is of the whole estate or fund to one, and another is to receive so much a year out of its rents and profits, that clearly gives the surplus to the first. Then, if the gift is to both, but so as one shall take yearly so much, is not this, in substance and effect, the same thing? The whole is given to both, not in fixed proportions, but with a certain amount to the one and the unascertained residue to the other. It is distributed, and their shares are ascertained, not by division but subtraction. Now, if you examine all

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[†] 8 Co. Rep. 130.

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the cases, both those to which I shall presently refer more particularly, and the others which are well known, the cases of *Attorney-General v. Johnson*,† *Attorney-General v. Sparks*,‡ *Attorney-General v. The Mayor of Coventry*,§ and *Attorney-General v. Haberdashers' Company*,|| you will find nothing that militates against this plain and natural construction, but much that supports it. Yet the case I have put is in substance the case at Bar ; for the intention of the gift is for the relief and sustentation of the master and poor ; and that intention is executed by erecting a college or hospital for the master and five paupers ; the master to be master of the hospital, and of the goods, chattels, and lands, &c., thereof (which distinction further aids the argument on his behalf), and the five paupers to receive for their support, relief, and maintenance, 52s. each, through the hands of the master ; and the funds are to go to the support of the master and paupers, and for repairs, and not otherwise. This certainly is, at the least, a gift of the whole to the master and paupers ; the amount receivable by the latter being ascertained, that receivable by the former unascertained ; in other words, the surplus being the master's, after paying the paupers and providing for the repairs. It is clear that there is no middle course between this construction and one which would give the paupers first their fixed payment of so much a year, and then their share of the residue also.

The importance of the question not only in itself but in its possible consequences, as well as the circumstances of my having the misfortune to differ with his Honor in the opinion which I have formed, induces me further to consider the authorities that are supposed to bear upon the subject. An examination of these tends greatly, I think, to confirm the view which I take.

[After referring at length to the authorities already mentioned and stating that “ no authority can be cited, that a gift of a fund to certain parties, all alike objects of the charity, and specifying what some shall take without mentioning the others in this respect, or establishing any proportion among them, entitles

† Amb. 190.

‡ Amb. 201.

§ 18 R. R. 238 (2 Vern. 297, and

7 Br. P. C. 235, Toml. ed.)

|| 4 Br. C. C. 103.

those whose shares are fixed to a share also of the residue," his Lordship concluded by saying:]

It remains to consider whether there be any other circumstances connected with the present case which entitle us to give a different construction to the grant. To speculate upon intentions which may be supposed to exist respecting the paupers, inconsistent with the precise and defined purpose intimated as to them in their relation to the master or the body of which they form a part, would be extremely unsafe, and could indeed lead to no satisfactory result. Such topics on the one hand are met and balanced by others of at least equal force and pertinency, such as the station and functions of the master both in the hospital and in the church. But there is one particular which deserves much more attention, and appears to have greatly weighed with the Court below,—the power given to the Master to make bye-laws, with the assent of the Attorney-General and Solicitor-General, for the ordering and disposing of the charity estates. I am of opinion, however, that this does not alter the position in which the case is left upon the construction of the rest of the instrument; first, because I take it that in making such regulations it must always be understood that they shall not be inconsistent with the body of the rules laid down originally in the governing charter, the letters patent themselves; but next, and principally, because no such disposition as it is contended ought now to be made of the revenues has ever been made under the power referred to; and therefore the question is, whether or not the parties can now be compelled to make it, or the Court can make it for them. They can only be compelled if it be according to the intention of the donor. They would only be justified in making it, uncompelled, if the donor's provisions allowed them; but they could only be called upon by the Court to make it, if those provisions required them to do so. It therefore seems to me that this view of the question brings us back to the one first taken, and upon which the whole turns.

It is impossible in cases of this description to lay out of view the length of time during which a certain arrangement has subsisted, and a certain meaning has been given in practice to the instrument of foundation. If, indeed, the practice (though of

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centuries) has been a breach of trust, doubtless the lapse of time shall be no bar. But long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions under which both conflicting parties *claim; and a principle of distribution under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not without manifest reason to be disturbed. The rule of interpretation from contemporaneous usage and long acquiescence extends over every branch of the law, independently of its connection with matter of limitation and bar. I speak not now of a course of dealing with charitable funds in the absence of evidence respecting the original endowment, or in plain opposition to its provisions. But where the endowment is forthcoming, its construction may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting.

It may be added, that in all such cases of contest between the different objects of the founder's bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed and restricted portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage; but the usage may be a confirmation of the evidence which the instrument affords that the exclusion was intended.

I am therefore of opinion, that so much of this decree as declares that the almsmen of the hospital are entitled to share rateably with the master in the increased revenues of the charity cannot be supported, and ought to be

Reversed.

[Other proceedings in reference to this charity are reported in 1 Keen, 289 (where the above judgment of Lord BROUGHAM is reported at pp. 300—308); 2 Myl. & Cr. 135; 5 L. J. (N. S.) Ch. 247; 6 L. J. (N. S.) Ch. 35.]

TOLNER *v.* MARRIOTT.†

(9 L. J. Ch. 14—17.)

Vesting of legacies.

Where a testator directs a legacy to be paid, if the legatees claim within a given time: Held, that a bill filed for the administration of the assets is a claim sufficient to satisfy the words of the will.

Vesting of legacies, where, by the bequest thereof, they were given to be paid on a day certain, “and in case any of the legatees should die before that day, that their legacies should be given to whomsoever of his or her children to whom he or she should bequeath it.”

1830.
Nov. 10.
—
Lord
LYNDHURST,
L.C.
[14]

— MICHAEL BARRETT, by his will, dated the 17th September, 1804, amongst other things, gave to each of the sons and daughters of his sisters, Sarah Rooney and Elizabeth Rooney, who should be living at his decease, the sum of 100*l.*, to be paid to them in London, or remitted to them in Dublin, provided they should claim the same within five years from the day of his decease, by a writing under his, her, or their hands or hand, and delivered to his executors, or to any or either of them, not otherwise; and he directed the same to be paid to such as were daughters for their separate use. And the testator also gave the following legacies to be paid on the 10th of May, 1821, namely, after giving certain legacies to his wife, and to Alice Wheeler, and Maria Tolner, as therein mentioned, he gave to all the rest of the sons of his said two sisters, Sarah Rooney and Elizabeth Rooney, 500*l.* each, and to each of their daughters 300*l.*, and in case any of his nephews or nieces should die before the said 10th of May, 1821, that his or her legacy of 500*l.* and 300*l.* should be given to whomsoever of his or her children, to whom he or she should bequeath it; the said legatees, if living in Ireland, to be identified by a banker in Dublin, or a justice of the peace, and the Popish rector of the parish where they live, or any convincing proof that might satisfy his executors, within three years after they became entitled to their said legacies; otherwise, if no claim or notice was given to his executors, or either of them, within the said term of three years, their legacy and bequest thereof should become null and void.

By a codicil to his will, dated the 31st of October, 1806, the

† Another report of this case, taken from 4 Sim. 19, will be found in 33 E. R., at p. 88.

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testator gave the residue of his estate to William Michael Tolner and Sarah Barrett.

The testator died on the 10th of November, 1806 ; at the death of the testator, Sarah Rooney had three children, viz. Mary Barnes, and two others ; and Elizabeth Rooney had five children, viz. Luke Rooney and four others. Luke Rooney died in the year 1810, without issue, after having made his will. Mary Barnes died, without issue, in the month of November, 1821.

A bill was filed for the purpose of establishing the will of the testator within five years after his decease, and for the general administration of the assets. Letters of administration, with the will of Luke Rooney annexed, and also letters of administration of the goods and chattels of Mary Barnes, were granted, on the 4th of May, 1829, to Patrick Rooney.

By a report of the Master, after various references, he found in effect, that Patrick Rooney was entitled to the legacy of 100*l.* bequeathed to Mary Barnes, as one of the children of Sarah Rooney ; and also to the legacy of 300*l.* bequeathed to her as her administrator, and also to the legacy of 100*l.* bequeathed to Luke Rooney, as one *of the children of Elizabeth Rooney, as the administrator with the will annexed of Luke Rooney ; but to no part of the legacy of 500*l.* bequeathed to Luke Rooney.

The *Solicitor-General* (*Sir Edw. Sugden*) appeared in support of a petition of the residuary legatees, and contended that, as no claim was made within five years of the testator's death, for the legacy of 100*l.*, Patrick Rooney was not entitled as the administrator of Luke Rooney to that legacy ; and further that, as to the legacy of 100*l.* to Mary Barnes, Patrick Rooney, as her administrator, for the same reason could not be entitled, nor to her legacy of 300*l.*, inasmuch as by the evidence, it was proved she died in November, 1820, and, therefore, was not living at the time the testator appointed by his will, that the legacies to his nieces should vest.

Mr. Knight and *Mr. Wray*, on behalf of Patrick Rooney, the personal representative of Mary Barnes and Luke Rooney, insisted that he was entitled, not only to the 100*l.* legacy of

Luke Rooney, but also to the legacy of 500*l.*; for that the legacy was vested at the death of the testator, and the payment only postponed to the 10th of May, 1821: and as to the legacies to Mary Barnes, they contended that the evidence proved she had lived to the month of November, 1821, and therefore, a period beyond that at which the testator directed they should be paid, even supposing there should be a question as to the time when the legacy of 300*l.* should vest. Then, with respect to the legacies, both to Mary Barnes and Luke Rooney, the institution of the suit was a sufficient claim to satisfy the requisitions of the will of the testator.

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THE VICE-CHANCELLOR :

In the present case, four questions have been made by means of two petitions presented in consequence of the Master's report. It appears that the testator, by his will, in the first instance gave to each and every of the sons and daughters of his two sisters, Sarah and Elizabeth Rooney, who should be living at the time of his decease, the sum of 100*l.*, "to be paid to them in London, or remitted to them in Dublin, provided they claim the same within five years from the day of my decease, by a writing under his, her, or their hands or hand, and delivered to my executors, or to any or either of them, not otherwise:" and in respect of two legacies of 100*l.* each, given to Luke Rooney and Mary Brent, it has been made a question whether they are entitled, inasmuch as they did not claim within five years after the day of the testator's decease; and a similar point is made to arise, as to one of the legacies which are given by the clause I am now going to state: "I further desire, that, on the 10th day of May, 1821, all the said annuities hereinbefore granted shall cease, and be no longer paid; and in lieu thereof, I bequeath the following legacies, to be paid the said 10th of May, 1821, or as soon afterwards as possible." Then to his wife 500 guineas; 500*l.* to Alice Wheeler, and to Maria Tolner 500*l.*; "and to all the rest of the sons of my two sisters, Sarah Rooney and Elizabeth Rooney, 500*l.* to each, and to each of their daughters 300*l.*" Then he says, "And I further desire, that, in case any of my said nephews or nieces should die before

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 F.
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the said 10th of May, 1821, his or her legacy of 500*l.* and 300*l.* aforesaid shall be given to whomsoever of his or her children, to whom he or she shall bequeath it; the said legatees, if in Ireland, to be identified by a banker in Dublin, or a justice of the peace, and the Popish rector of the parish wherein they live, or any convincing proof that may satisfy my executors or administrators, or the survivors or survivor of them, his or her executors or administrators, within three years after they become entitled to their said legacy; otherwise, if no claim or notice be given to some one of my executors within the said time of three years, their legacy and bequests thereof shall become null and void." Now, with respect to the legacy to Mary Barnes, the same point has been made; namely, that there was no claim within five years: and those three points, I think, may be disposed of at once, because it has been admitted as a fact, that there was a bill filed within five years after the testator's death, which bill, I presume, was for the purpose of administering the assets of the testator. In the case of *Franco v. Alvares*,† where the testator had directed that certain benefits should be given to his creditors, provided they made a release within four months and

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*two days before the expiration of the four months. A bill was filed by some of them on behalf of all of them, for the purpose of having the benefits he intended. My Lord HARDWICKE held that that was a sufficient compliance with the terms. It appears to me, therefore, that it must be considered, according to the authority, that a bill filed for the administration of all the estate, and for the payment of all the legacies, must be taken as equivalent to a demand by each of the legatees for his legacy. Then, the next point that is raised there was a question of fact raised with respect to the legacy of Mary Barnes: that I consider myself as having disposed of when the case was before me, because I think it was clearly made out upon the evidence, that Mary Barnes did survive the 10th of May, 1821. Then, the last question is, whether Luke Rooney, who died before the 10th of May, 1821, probably about the year 1810, whether he had a vested legacy of 500*l.* Now, it appears that the testator had in the first part of his will given to his wife, and Maria Tolner, and Alice Wheeler,

† 3 Atk. 342.

certain annuities for their lives; and it does not very clearly appear why the testator has fixed on the period of the 10th of May, 1821. In a former part of his will, I observe that a legacy is given; an annual sum is given to the wife, in trust for Catherine Jane Pickford, who is the grand-daughter of his eldest sister, until the 10th day of May, 1815; but no reason appears, as I can make out, on the face of the will, why either one period or the other was selected. It is possible that the testator might have made a calculation, that by the 10th of May, 1821, there would have been a sufficiently accumulated fund, arising from the residue of his real and personal estate, to answer the legacy. Then it is observable, that the legacies which are given in this clause are given out of the mixed fund which should arise from the residue of the real and personal estate and the accumulations. If the legacy had been given out of the real estate alone, why I could very fairly have applied the rule which is laid down in *Louthier v. Condon*,† and a number of other cases, that where the time of payment is selected with a view to the circumstances of the estate, it is not necessary for the vesting of the legacy that the legatee should live to the time appointed: but here the legacy is given out of a mixed fund; therefore, it does not apply, certainly, as the whole of the legacy is payable out of a mixed fund; but the testator has blended together in one sentence, the gift both of the legacy of 500*l.* to the nephew, and also the legacies which are to go to the three annuitants in lieu of their annuities. Now, it appears to me, he must have intended that the legacies should all be taken upon the same condition; and I can hardly suppose, when he has given the legacy of 500*l.* in lieu of the annuities which were given for life, that he meant, that if the annuitants had died before the 10th of May, 1821, they should take their legacies in lieu of the annuities which did not exist. I think it is plain, therefore, with respect to the annuitants, that the legacies were by the first clause given in lieu of something which should be in existence on the 10th of May, 1821, and that if he did not mean to give the legacies to the nephews in a more beneficial manner than the legacy to his wife, and to Alice Wheeler, and Maria Tolner, it would follow,

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† 2 Atk. 127.

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from that consideration alone, that if the nephews were not alive on the 10th of May, 1821, they did not take ; but that does not appear to me to be the only observation that arises upon that clause, because he says, “ And I further desire, that, in case any of my said nephews or nieces shall die before the 10th of May, 1821, his or her legacy of 500*l.* or 300*l.* as aforesaid, shall be given to whomsoever of his or her children, to whom he or she shall bequeath it.” Now it appears to me, therefore, that it is very fairly to be inferred from this part of the clause, that the testator thought there could be no power of bequest in his nephew or nieces dying before the 10th of May, 1821, over the legacies of 500*l.* and 300*l.* ; therefore, he has himself expressly provided, that in the event of a nephew dying before that time, the legacy shall pass to such of his children to whom he shall give it. That appears to me to shew the inference, that the testator did not conceive that there would be any power to give the legacy to the legatee himself dying before that day. Then he goes on to state, that the parties are to be identified in a given way, “ within *three years after they become entitled to their legacy ; otherwise, if there is no claim, the legacy shall become null and void.” Now, it appears to me, that the expression, “ within three years after they become entitled,” can only be referred to the 10th of May, 1821 ; for if the legacy was vested, it was vested at the testator’s death, and then the expression would naturally have been used, “ within three years after my decease,” whereas it is plain here, the testator speaks of a time when they shall become entitled as a contingent time. It appears to me, that the view of the case can only be answered by supposing the testator did not mean the legacy should vest, unless the legatee did live till the 10th of May, 1821. For these reasons, the Master’s report must be confirmed.

The following [among other] cases were cited: *Harrison v. Foreman*, 5 R. R. 28 (5 Ves. 207) ; *Sturges v. Pearson*, 20 R. R. 316 (4 Madd. 411) ; *King v. Withers*, 3 P. Wms. 414 ; *Bayley v. Bishop*, 7 R. R. 132 (9 Ves. 6).

FAULKNER v. SALMON.

(9 L. J. Ch. 155—156.)

1831.

LEACH, M.R.

[155]

Guardian and ward—Voluntary gift.

A gift by a ward to her guardian, shortly after her attaining her majority, will be set aside by a court of equity.

ANNE FAULKNER, as grand-daughter and next of kin to Elizabeth Duckett, was entitled to a bond debt of 2,100*l.* due from Mrs. Salmon (the aunt of Anne Faulkner) to Elizabeth Duckett.

Mr. Salmon and Mr. Goldby were the guardians of Anne Faulkner, and the latter was administrator of the estate of Elizabeth Duckett, and as such, held the bond until Anne Faulkner came of age: the latter lived with Mr. and Mrs. Salmon for some years previously to that time; and when she came of age Goldby handed over to her the bond. A few months afterwards she gave it to her uncle, Mr. Salmon, as a token of gratitude for acts of kindness received by her from him and Mrs. Salmon. He thereupon destroyed it.

Some years subsequent to this transaction Anne Faulkner married, and the bill was filed for the purpose of setting aside the gift and charging the estate of Mr. Salmon (who had died in the meantime), with the repayment of the 2,100*l.* and interest. It was proved, that, after the time Anne Faulkner came of age, and at the time of the gift, she continued to live with Mrs. Salmon; and that she acted perfectly voluntarily in giving up the bond; and that she expressed herself as not having regretted that act.

Mr. Bickersteth, for the plaintiff, [cited *Hatch v. Hatch*;† *Ex parte Lacy*;‡ *Montesquieu v. Sandys*,§ and other cases.]

Mr. Pemberton, for the defendant, relied upon the facts, proved in the cause and not attempted to be denied, that the gift was purely and entirely voluntary, not obtained by any undue influence. * * *

† 7 R. R. 195 (9 Ves. 292).

§ 11 R. R. 197 (18 Ves. 302).

‡ 6 R. R. 9 (6 Ves. 625).

FAULKNER THE MASTER OF THE ROLLS :

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It is quite plain that the gift in question was made by this lady before the connexion of guardian and ward had entirely ceased between Mr. Salmon and herself; it is therefore quite impossible, consistently with the settled principles of policy adopted by this Court for its guidance in matters of this description, to say that I ought to confirm the transaction. I am very much inclined to be of opinion, that, even if that connexion had not existed between the parties, this gift could not have been supported, under all the circumstances of the case.

The estate of Mr. Salmon must repay the full amount of the bond, and all arrears of interest due upon it.

1831.

January.
April 15.

Lord
BROUGHAM,
L.C.
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THOMPSON v. BARCLAY.

(9 L. J. Ch. 215—223.)

A. contracts for a loan to a foreign state, not acknowledged by this country; B. purchases part of the loan, and sells some of the scrip to C.; C. makes several payments, according to his agreement, and then ceases to make them upon the representations of B.; C. then files a bill against A. and B. to get back his money; B. is out of the jurisdiction. A. demurs generally, and the demurrer is allowed, the Lord Chancellor most seriously doubting the soundness of the decisions, in accordance with which he felt bound to decide.

THE bill stated, that, in August, 1825, six of the defendants carried on business in co-partnership, under the firm of Barclay & Co.; and that, in the same month, the other two defendants carried on business in co-partnership under the firm of Powles & Co.; that, in the said month, Barclay & Co. advertised that, on the 22nd, they should proceed to sell the certificates of the obligations of the Government of the Federal Republic of Central America or Guatemala, to the amount of 1,428,571*l.* 8*s.*, and that they were ready to receive tenders for the same, pursuant to a printed form prepared by them, and specified in the advertisement; that soon after Powles & Co. tendered for the purchase of the whole, at 68*l.* per certificate, and undertook to pay 15*l.* per cent. down, and the remainder by monthly instalments, upon payment of the last of which, the certificates were to be delivered; but in case of default in payment of any of the instalments, all previous

ones were to be forfeited, and Barclay & Co. were to be at liberty to resell; which tender was agreed to; and it was announced, publicly, that Powles & Co. had contracted for the said loan.

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The bill then stated, that Powles & Co. prevailed on the plaintiff to become a purchaser of a part of the said certificates, which he agreed to, to the amount of 10,000*l.*, being at the price of 73*l.* per certificate, and he paid down 10*l.* per cent. upon the purchase-money, and received scrip receipts, headed "6*l.* per cent. loan;" upon which Powles & Co. agreed to deliver the certificates on payment *of the purchase-money by certain instalments therein specified, and in default of payment of any of which, the whole previous instalments were to be forfeited, and Powles & Co. at liberty to resell the certificates.

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The plaintiff paid up to the fifth instalment, into the house of Barclay & Co., by the direction of Powles & Co., when, upon the representation of the latter, that there was some disagreement between the Guatemala Government and Barclay & Co., he ceased to pay the instalments.

The bill then stated and charged that the whole transaction was a fraud; for that, although acting as distinct firms, all the defendants were partners in the loan, and were to divide the profits; and that the plaintiff had been advised by Powles & Co. not to pay the sixth instalment, in order that the former payments might be forfeited. There were a variety of other charges of fraud, particularly that no money had been paid to the Guatemala Government, who had, in consequence, refused to answer any of the obligations. The bill then prayed, that the defendants might be declared liable to the plaintiff, under the circumstances, for the amount of the several sums paid by him, for instalments upon his purchase-money, that they might be decreed to pay the same to him, with interest, at 5*l.* per cent., from the date of each payment.

To this, the defendants, Barclay & Co., generally demurred, the other defendants being out of the jurisdiction; and, upon argument before the Vice-Chancellor, his Honor allowed the demurrer and dismissed the bill.

From this, the plaintiff appealed. The case was elaborately argued for the various parties, by *Sir Edward Sugden, Mr. Knight,*

THOMPSON *Mr. Pollock, Mr. Purris, Mr. Hill, and other counsel, and a*
f.
BARCLAY. *variety of cases were cited. Great stress was laid by the appel-*
lant's counsel on the fact of the defendants having demurred
instead of answering; and inferring from that, that the charges
of fraud in the bill did not admit of any defence. A great number
of cases were cited, the principal of which are noticed, and
observed upon by the LORD CHANCELLOR in his judgment, which,
after taking time to consider, he delivered.

April 15. THE LORD CHANCELLOR :

This is an appeal from a decision of his Honour the VICE-CHANCELLOR, allowing a demurrer to a bill filed by the plaintiff against the defendants, on the ground of certain frauds. The frauds alleged in the bill are of a complicated and indeed of a very aggravated nature. Two parties pretended to the public, and among others to the plaintiff, Mr. Alderman Thompson, that they were unconnected, excepting in so far as one was the agent of the Guatemala Government, for the sale, and the other as the purchaser of a loan for that Government. The Guatemala State was one of those newly formed by the revolt of the colonies of Spain from the mother country, and not acknowledged by the Government of England. Now, that representation of the two parties being wholly unconnected, and that one had purchased, would be a matter of consideration with a party dealing as the plaintiff did; for by the alleged pretended sale to Powles & Co., there was a price supposed to have been offered in the open market; whereas, if that were not so, there was no test of value of the scrip. Another part of the fraud is stated to be, that Barclay & Co. never paid any money to the Government of Guatemala, for whom they were agents; and that they and their confederates had entrapped the plaintiff into the purchase, so that as the Government refused to ratify the scrip contracts, a double fraud was committed. Now, the question is, whether there is anything in this, which affords a ground of equitable relief to a person situated as Mr. Alderman Thompson is.

To this bill, the defendants, Barclay & Co., demur; and I beg to say, I totally dissent from the doctrine laid down by the plaintiff's counsel, that, by demurring to this bill, they at all

admit the serious, aggravated, and disgraceful charges contained in it. Every person, by the law of this country, has a right, upon being made a defendant, to call upon a party who brings him before the Court, to state what equity he has had so to do; and if he does not shew it, then such defendant has an undoubted right to stand upon his strict legal defence; and everything he says by a demurrer is barely and simply this: Even supposing all you have stated be true, still, in a court of equity, you have no claim against me. It *is perfectly true, that if a party chooses to waive his objection in point of form, and say: The facts are so groundless you allege against me, that I do not mean to avail myself of the law at all, but will go to issue upon the facts, and for that purpose will deny them by my answer—that course is open to him. But it is equally clear, that a professional man, under whose advice the parties are understood, generally speaking, to act, would not either wisely or rightly discharge his duty to his client, if he were not to advise him—there is no equity in the bill against you. Therefore it is, that I will never permit it to be said, without contradiction, so far as my most decided opinion goes, that where a defendant demurs at law, (where the admission of the fact is much more binding than it is in this Court), or to a bill in equity, that he is to be taken as if he confessed the truth of the allegation. The admission of the truth of the allegation in the present bill, would be most disgraceful to the defendants, and therefore I, for one, will not hold them to have confessed them; but consider them only to have chosen, as they had a most undoubted right to do, to stand upon their strict legal ground of objection.

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et
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There were three several grounds principally relied upon below, and here, in support of the demurrer; namely, usury—the general want of equity—and the peculiar character of the Guatemala Government, for whom Messrs. Barclay were stated to be the agents, and for whom the loan and the scrip in question were said to have been contracted. I do not think it necessary, formally, to dispose of either of the two first points, because I consider that I am bound by previous decisions on the third point, and that is quite sufficient to dispose of the case. Nevertheless, as what I am about to state, may possibly

THOMPSON have the effect (which I should not at all regret), of having this
 v. decision reviewed elsewhere; I feel it to be my duty, in giving
 BARCLAY. my reasons for the judgment of affirmance I am about to pronounce, to avert briefly to the first points also; because, if this judgment were to be set aside, elsewhere, on the third ground, it could be supported on one or other of the two first. * * [After dealing with the first two points his Lordship said:] On the third ground I entertain no doubt whatever, and I am clearly bound by the case of *Jones v. Garcia del Rio*,† and still more so by that of *Baring v. Thompson*,‡ both decided by Lord ELDON, the second after consideration, and after having *thrown out doubts in the case of the first, which appears to be at least as strong on the third ground as the present case, and quite sufficient to support the VICE-CHANCELLOR's decision now under our notice.

The ground is such as I cannot conceive to be exceeded in importance. The basis of the claim is upon the assumption that Messrs. Barclay were agents of the Guatemala Government; if the subject-matter of dispute is not of itself a loan, it clearly arises out of a loan, from the subjects of this country to the Guatemala Government; and the defendant says, therefore the plaintiff has no redress—why? because that Government is not recognized by this country: and, that is conformable to Lord ELDON's decision. With all imaginable deference towards the most venerable authority of that learned Judge, I feel bound openly and honestly to declare, that, had this point come before me for the first time, unincumbered by other decisions, I should have come to a different conclusion. I say this advisedly, and after having endeavoured to see reason to alter my opinion, the result of which has been the more strongly to confirm it. The present case as put in the argument is this: that as the Guatemala Government is not recognized by this country, that therefore no relief can be given in equity to a party who comes into Court complaining, that by using the name of that Government, and by affecting to deal under the authority of that Government, and by contracting a loan with British subjects, to be advanced for the service of that Government, he, a British

† 24 R. R. 64 (T. & R. 297).

‡ Not reported.

subject, has been defrauded; but that the Court shall be shut against his complaints. Again I say, that, had this arisen for the first time now, I should feel bound as a Judge sitting here, fairly and conscientiously to say, that such an answer would not be a sufficient answer to the plaintiff's claim. Lord ELDON, in *Jones v. Garcia del Rio*, falls into a train of reasoning, along with which, I say with the greatest respect, I cannot go. He says, "We all know that Peru was a part of the dominions of Spain, and that Spain and this country are at peace, and that this Government has not acknowledged the Government of Peru. I want to know, whether, supposing Peru to be so far absolved from the Government of Spain, that it never can be attached to it again, the King's Courts will interfere at all, whilst the Peruvian Government is not acknowledged by the Government of this country. What right has the King's Judge to interfere upon the subject of a contract with a country which he does not recognize? Another question is, whether, if individuals choose to advance their money for the purpose of assisting a colony opposed to its parent state, that parent state being at peace with this country, the courts of justice here will assist them to recover their money, or will not leave them to get it as they can." His Lordship then sets forth the inconvenience that would arise from this course.

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As to the second argument, it appears to stand in a different predicament from the first. How far the Courts of the country could, either in form, or legal substance, be called upon to assist a party who had actually made a loan to a foreign Government, not recognized by this country, and that Government being of a revolted colony of a mother country at peace with us, and thus furthering the objects of those rebels, and so far forth defeating the policy of this country, that is a question upon which I should entertain a strong inclination of opinion in favour of the *dictum* of Lord ELDON (and it was only a *dictum*), that our Courts could not in form or substance lawfully assist such a party, for it would be nothing less than assisting the loan to a country, which country our Government had not recognized. But it seems to me a totally different proposition to maintain, that if a person comes into the country as the agent of that Government, and, under the name of such agent, defrauds another (and here, I

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[*221]

beg to say, I merely put this by way of argument, for although Messrs. Barclay & Co. have not denied, *non constat* that they cannot disprove the fraud,) by the sale of the scrip which he knows is not worth a farthing, and for that purpose covinously, with a confederate in the bubble, raises the nominal value, and so procures a higher price—to say that this, merely because it is bottomed on the assumed existence of a Government not recognized here—to say that, because the name of a non-existent, or non-recognized *power has been used, therefore, the plaintiff who has been so defrauded is not to be considered as having *locus standi in judicio*, because it would defeat the policy of this country, as recognizing a power which our Government, under the authority of which alone this Court acts, appears to me to be a proposition not only unlike, but wholly at variance with the first I have mentioned. In fact, it is assuming, that if a man uses the name of a Government to perpetrate a fraud, and in the course of a loan which may be perfectly irrecoverable in equity, which may be perfectly illegal in itself, because he commits the illegality of contracting a loan with a Government which this country has not recognized, therefore, by a trick, he may with impunity defraud the people of this country by means of the scrip arising out of that loan, is advancing a proposition not only not maintainable, but, I confess, with deference to the opinions of other legal authorities, in my opinion entirely illogical, and utterly unintelligible.

Whenever this country refrains from acknowledging another country, whether from motives of public policy or otherwise, the Courts of this country hold that the Government of that foreign country is a non-existing thing, and therefore refuse to interfere in the dealings of suitors with such foreign Government; and so far I understand the word “recognition.” But in the present case, what do we mean by the word? “Recognition” so applied misleads. Are we not misleading when we apply it here, and talk about relief to Mr. Alderman Thompson, which he prays by his bill, being a recognition of the Guatemala Government? A Court would be recognizing that Government if it gave relief to its agent, as such agent, and it would recognize the Guatemala loan if it enabled a party so suing, to make good a transaction

bottomed on that loan. If the cases went no farther than that, I should have no hesitation as to the soundness of the principle upon which they turned. But how can I be said to recognize the Guatemala Government, or sanction the Guatemala loan, if all I do in this case (and that is all the bill asks of me to do) is to admit the proposition that Mr. Alderman Thompson has a right to have his money paid back, which two men fraudulently confederating together, have got out of his pocket, under the pretence of being agents of the Guatemala Government. I do not see that I recognize the Government by saying that the plaintiff has been defrauded out of his money, and that he has a right to have it back. I do not recognize a Government *in terra Australi incognitâ*, as says Sir JOSEPH Jekyll, if I decree so many acres of land to a man where no land lies; I do not recognize a Government; I do not in point of geography admit that such a country exists which can be governed: nor do I interfere with the policy of this country, in respect of that which it has never recognized, any more than the *terra Australis incognita*. All I say is, that a fraud has been committed under the colour of a thing being in existence which does not exist. I do not apply to that thing a moral or a political existence, which is only cognizable by recognition of the State in the way I have said; nor even a physical existence. When we condemn a man at the Admiralty Sessions for piracy, for taking possession on the high seas of ships belonging to the South American States, we do not by that act recognize those States. Ships are emphatically the property of the State, not of the individual; and let us put this case: a man fits out a trade-ship at Plymouth, and cruising in the South Seas, falls in with, and takes a vessel bearing the Guatemala flag, or the property of that Government or persons exercising that Government, and the property of no other individual under the sun. He seizes the vessel, takes the men out, pays them their arrears of wages, and kindly "entreats them," and lands them safely at their own homes, so that there is not the slightest injury done to them personally, but all the injury done to them is in the capacity of mariners to the Guatemala Government. The injury therefore is done to that Government, whose servants they are. The ship is armed

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BARCLAY.

THOMPSON against the mother country, and is taken by the Plymouth
 BARCLAY. trader: whose property is taken? The public property, or
 none at all, for it could not be laid as the property of any
 man in an action of trover, except the mere transient possessory
 [*222] title, which gives the right at law against the *wrong-doer*, *and
 raises no question of property. The sufficiency of a transitory
 possession to support an action of trover, is from the hatred the
 law has to a wrong-doer. Now, if the commander of this
 trader were tried at the Admiralty Sessions, how would the case
 stand? He has committed piracy in seizing a ship on the high
 seas, which did not belong to him. That ship was the property
 of the Guatemala Government, or of nobody at all. Would the
 Court listen for a moment to an argument against the execution
 of the pirate, that it would be a recognition of that Government?
 No one would venture to argue such a point. Shall, then, the
 courts of equity view the commission of fraud with less hatred
 than the common law views ordinary tort? It would be sufficient
 in the case which I have put, to satisfy the criminal law, and
 undoubtedly the common law, that a piracy was committed, and
 I think for equity (by a parity of reasoning), to say that a fraud
 is committed, in the case now before the Court.

Now, the case by which I feel most bound, is that of *Baring v. Thompson*, though with many doubts of the foundation on which it rests. That case is not reported, but there is a very full account of it in *Thompson v. Barclay* in Simons's Reports, and given to us by the highest authority.† The facts of the case were these, and we see that they rule the present case, though they leave that decision open to the objections which I have pointed out. A party had entered into a mining contract with the Government of Central America, the Republic of Columbia; he could not carry it into effect without a loan; he had agreed with the plaintiff, Baring, for a loan, upon consideration of transferring his share of the contract. Baring agreed to advance the money on these terms. Thompson thought proper, in fraud of the

† [The reference is apparently to *Bire v. Thompson* (*sic*), but probably the plaintiff's name should be Baring, as here), as stated in SHADWELL,

V.-C.'s judgment in *Taylor v. Barclay* (1828) 29 R. R. 82, 85, 2 Sim. 213.—F. P.]

agreement, to sell his contract to other persons. The bill for the injunction was to prevent the further parting with it. Lord ELDON said, that there was sufficient ground for equitable relief, as to the injunction, if there was no other defect in the plaintiff's title; but he refused the application, because the original contract was made with the Government of Columbia, unrecognized by this country. Now, the giving the injunction would have been no furtherance of the policy of the Columbian Government, it would not have helped it to get its loan. But the refusing it, was playing into the hands of that Government; it was doing the work, was acceding to the prayer, was supporting the cause of its agent; for Mr. Thompson was going elsewhere, to get money upon better terms than he could from Mr. Baring; so that it was better for the Government, if the injunction was refused, than had it been granted.

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BARCLAY.

Lord ELDON appears to have been led away by the idea, that if he allowed anything to be said of the Government at all, whether in case of complaint of fraud committed in its name, or of a fraud sought to be committed by its agent upon another; if he gave relief at all where that Government was named, that was a recognition of its existence. Physically, he did recognize it, but not either politically or judicially. The Government was itself as remediless as ever; and, had the injunction been granted, it could not have come into Court the next day to enforce the loan, for that was as much as ever illegal, and unsanctioned by the Court. I cannot help thinking, therefore, with the greatest submission, that the words "recognition" and "acknowledgment," and the generalities of these expressions to a certain degree, misled the judgment of Lord ELDON in that case. Recognize, a Court ought not to, and cannot in one sense; in another they do not, as in the case of *Baring v. Thompson*, upon the authority of which this case was decided in the Court below.

There is one mode, and one mode only, in which I can agree at all with the view taken by Lord ELDON of recognition; and that is by supposing that he assumed, that a party buying scrip of the contractor was a party to the loan itself. If that were his opinion, then I can see the drift of his argument. In that view,

THOMPSON however, namely, that the purchaser of scrip is, as such, a party
 v. to the loan, I entirely differ. Here, Mr. Alderman Thompson, in
 BARCLAY. my opinion, had nothing whatever to do with the loan itself.

[*223] The cases of *De Wüitz v. Hendricks*† and *Yrisarri v. Clement* ;
 were referred to, *and certainly Lord Chief Justice BEST, now
 Lord Wynford, appears to have held very strong language, and
 to have entertained a very decided opinion against the legality
 of loans of the present description. He says, in the first place,
 it is illegal to raise loans for subjects in arms against a friendly
 power; and therefore, in an action of trover, for the price
 deposited with the defendant, in furtherance of that loan, so
 (in his Lordship's opinion) illegal, he directed the jury against
 the plaintiff, who returned their verdict accordingly. This was
 in the former of the two cases; but in *Yrisarri v. Clement*,
 which was an action for libel, his Lordship does not state his
 own authority only, however respectable that authority may be,
 but gives the judgment of all the Judges of his Court, an
 authority, of course, in all cases, more weighty than that of
 a single Judge. The Court of Common Pleas, then, only state
 their "doubts" as to the legality of such loans, and no more.
 So that my impression is not a new notion upon the point.

Arguments upon it were very much considered in a celebrated
 case at Guildhall,§ which afterwards came before the Court of
 King's Bench. It was an action brought by Kinder & Co.
 against Everett. Kinder was one of the purchasers of *Garcia*
del Rio; it was a Mexican loan, on which 97,000*l.* had been
 deposited by Kinder in Everett's bank. The co-defendants in
Jones v. Garcia now became the conflicting parties in the Court
 of King's Bench. Mr. Kinder says, "Give me back my money;"
 Everett says, "No, for Lord ELDON says in *Jones v. Garcia*,
 in which we were co-defendants, you have no right to get back
 your money, because this is a loan to a foreign state not
 recognized by this country, and with the mother country of
 which we are at peace;" and the ground of defence set up was,
 that no one could claim the money; for to enforce such a thing
 would be to "recognize" (that is the magical word) the Mexican

† 27 R. B. 660 (2 Bing. 314; 3
 L. J. C. P. 3).

‡ 3 Bing. 432; 4 L. J. C. P. 128.
 § *Kinder v. Everett*, 3 Bing. 250.

Government. I feel bound to say, that my Lord TENTERDEN leaned towards that doctrine, and charged the jury for the defendant accordingly, feeling himself, no doubt, much influenced by *Jones v. Garcia del Rio*; the jury, nevertheless, after a few minutes' deliberation, returned a verdict in favour of the plaintiff, to the full amount. Whether the jury were right or wrong, it is not for me to say; but they seem to have been actuated by the common sense and honesty of the case, and to discard all technical niceties, and could not be prevailed on, by any weight of authority, to allow the defendants to keep 100,000*l.* in their hands, of other persons' money; for they did not even pretend to have any right or title to it themselves; their only defence being, that neither the plaintiff nor any other person in the world had a right to sue for it in the King's Court. For the defendants it was argued, that even although our Government should, the very day after, recognize and send ambassadors (as they have since done) to some one of those states, still the defect was incurable; the equities and rights of the parties must be taken as at the time of the deposit. A motion was made to set aside the verdict; but afterwards the money was paid.

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BARCLAY.

In that case much of the argument to which I have addressed myself was used. The law of nations was very much canvassed and considered by the Court; and it is a great satisfaction to me to know, that several most learned persons, now Judges on the Bench, entirely and deliberately concur with me in my opinion on the words "recognition" and "acknowledgment" as applicable to the question and to the principle of the case of *Jones v. Garcia del Rio*. The binding force of that case, and that of *Baring v. Thompson*, operates on me as they did upon the Vice-Chancellor. Those cases are pronounced, and unimpeached, and unappealed from; and therefore it is, that I feel bound by them, and must, therefore, affirm the order of his Honor. In dismissing this appeal, I confess it would be more satisfactory for me to see the matter receive consideration in a higher Court, where the opinion of all the Judges, and the opinions of men accustomed to view these subjects as lawyers cognizant of the law and policy of nations, as well as of the

THOMPSON v. BARCLAY. strict technical rules of courts of law and equity, could be had, and their valuable assistance obtained, either in affirming or not affirming my decision.

Appeal dismissed, but without costs.

ROLLS COURT IN IRELAND.

1824.
Nov. 10, 15.

*Rolls Court
(Ireland).*
M'MAHON,
M.R.
[202]

L'ESTRANGE v. ROBINSON.†

(1 Hogan, 202—204.)

A person who acquires the legal estate *pendente lite*, is a necessary party in the cause.

A parol promise before marriage will not support a deed executed after marriage, as against creditors.

THIS was a foreclosure suit, in which a receiver had been appointed, who, on the 19th of July last, obtained a conditional order for letting a part of the lands, which were in the defendant's possession.

The defendant filed his answer in January preceding, and thereby set up an assignment of these lands to his son, William Robinson, who was not a party in the cause. The assignment bore date after the bill was filed; and the plaintiff, without amending his bill, obtained an order for a receiver.

William Robinson, the assignee, now came in and applied to be examined *pro interesse suo*; and relied on the assignment to

† Neither in this case nor in a similar case (*Warden v. Jones* (1857) 2 D. G. & J. 76), which was decided in the same way under the corresponding section of the English Statute of Frauds, was the settlement expressly founded upon ante-nuptial agreement. The different wording of the English and Irish Statutes deprives this decision of any direct application to cases under the English Statute, but the reasoning upon which this decision turned rather shews that if the settlement had

recited the ante-nuptial agreement, the M.R. would have decided this case differently under the English Statute, which only requires a duly signed note or memorandum in writing of an ante-nuptial contract. Probably the decision of *Ex parte Whitehead* (1885) 14 Q. B. Div. 419, 54 L. J. Q. B. 240, 52 L. T. 597, may be found to have indicated a way by which any repetition of the injustice perpetrated by the decision of *Warden v. Jones* may in future be avoided.—O. A. S.

him, as cause against making the conditional order for a letting absolute. L'ESTRANGE
v.
ROBINSON.

THE MASTER OF THE ROLLS :

When a person gets an assignment of a property which is the subject of litigation, the question, whether he must be made a party to the suit, depends upon the interest he has acquired : if he has acquired the legal estate, he must be made a party, not for his own sake, but that he may be compelled by the decree, to join in any conveyance which the Court may order ; but if he has not the legal estate, he need not be taken notice of, and he will be dispossessed under the injunction of the Court.

Lefroy, Serjt. for William Robinson, the assignee :

The assignment was executed in consideration of a verbal promise made by the defendant to his son on his marriage, and long before the bill was filed. [203]

THE MASTER OF THE ROLLS :

A parol promise made before marriage, will not support a subsequent conveyance as against creditors ; but I will allow the motion to stand till to-morrow morning, that the deed may be produced in Court.

The assignment to the defendant's son, William, and his marriage settlement, were now produced in Court ; but neither of them recited or alluded to the verbal promise. Nov. 15.
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THE MASTER OF THE ROLLS :

The conditional order for letting these lands must be made absolute. Mr. William Robinson's title commenced *pendente lite* ; it only purported to be an assignment of the equity of redemption, and does not make him a necessary party to this cause, as he merely stands in the place of the person under whom he claims. If he desires his title to be taken notice of, he must file a supplemental bill, and make himself a party *pro bono et malo*.

A deed executed after marriage, in consideration of a parol undertaking made before marriage, cannot be supported against

L'ESTRANGE ^{v.} ROBINSON. creditors. If the recital in a deed executed after marriage, was allowed to give validity to a prior parol promise, it could only be on the ground that the construction of the 4th section of the Statute of Frauds (7th of William III. c. 12, Ir.) ought to be the same as that of the 1st section. The 4th section *only requires that all declarations or creations of any trusts or confidences of any lands, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will. It is therefore sufficient to shew the existence of the trust, by a writing signed at any time by the trustee: whereas the 1st section declares, that no estates or interests in lands shall be assigned or granted, unless by deed or note in writing, or else by act and operation of law. A parol promise would therefore vest no interest in Mr. William Robinson; and it must be taken that his title did not commence until the assignment was executed. None of the cases which were decided in England, before the English Statutes of Frauds, can apply to this question. *Montacute v. Maxwell*,† and *Dundas v. Dutens*,‡ were cases of gross fraud.

The MASTER OF THE ROLLS also referred to *Randall v. Morgan*,§ *Spurgeon v. Collier*,|| *Battersbee v. Farrington*,¶ and to Viner's Abr. Contract, A. 34.

The order for letting was made absolute.

1825.

March 1.

Rolls Court
(*Ireland*).
M'MAHON,
M.R.
[234]

DELANY v. MANSFIELD.††

(1 Hogan, 234—236.)

Money in a receiver's hands is in *custodia legis*, for whoever can make out a title to it.

When a puisne incumbrancer obtains the appointment of a receiver, any prior incumbrancer may file a bill, and attach the rents in his hands.

MR. CRUISE, for the plaintiff in the first cause, moved that a consent, signed by the defendant, might be made a rule of Court

† 1 P. Wms. 618.

‡ 1 R. R. 112 (1 Ves. J. 196).

§ 8 R. R. 289 (12 Ves. 67).

|| 1 Eden, 55.

¶ 18 R. R. 32 (1 Swanst. 106).

†† "Where money is in the hands of a receiver you must look in each case to all the circumstances, and in particular to the nature of the action and the object of the appointment of

in both causes; the consent was, that the receiver, who had been lately extended to the second cause, might pay a sum of money which was previously in his hands, to the plaintiff in the first cause.

DELANY
v.
MANSFIELD.

The bill in the first cause was filed in November, 1822, for the purpose of raising the arrears of an annuity; and there was a receiver on process in May, *1823. The plaintiff in the second cause, though a prior incumbrancer, was not made a party in the first cause. [*235]

The bill in the second cause was filed in October, 1824, and the receiver was afterwards extended to that cause. He had previously collected three years' rent; and the plaintiff in the first cause rested his present application on the ground, that as these rents were collected in consequence of his diligence, the Court would consider them as bygone rents, as against the plaintiff in the second cause: *Gresley v. Adderley*.†

THE MASTER OF THE ROLLS:

I do not consider the right of the plaintiff in the first cause to be such as he now asserts it. This application is inconsistent with the course of business in a court of equity, as a receiver in a cause is not appointed for the benefit of a plaintiff merely, but for all other persons who may establish rights in the cause. A receiver cannot be more the agent of the plaintiff than a sequestrator; and *Walker v. Bell*,‡ is an authority to shew, that rents received by sequestrators are not considered as vested in the plaintiff, but are in *custodiâ legis*; and there must be a further order before they can be applied for the benefit of the defendant; and if other parties come in the mean time, and establish a prior right, they become entitled to them. Any argument which treats rents in the hands of a receiver as if paid to the plaintiff, is quite unfounded, and subversive of *the rights of prior creditors, who are not parties to the cause, to be examined *pro interesse suo*. If money as soon as collected by a receiver is to be considered [*236]

the receiver," per STIRLING, J., *In re Hoare*, '92, 3 Ch. at p. 103, 61 L. J. Ch. 341, 67 L. T. 45; and see *Thomas v. Brigstocke* (1827) 28 R. R. 4 (4 Russ. 64).—O. A. S.
† 18 R. R. 146 (1 Swanst. 573).
‡ 17 R. R. 174 (2 Madd. 21).

DELANY
v.
MANSFIELD.

the property of the plaintiff, every enquiry in a decree as to prior incumbrances must be to a great extent useless. If a puisne creditor gets a receiver, a prior creditor may file a bill, and attach the money in his hands.

1825.
March 5.
June 22.

Rolls Court
(Ireland).
M'MAHON,
M.R.
[238]

MORRIS v. MORRIS.

(1 Hogan, 238—243.)

It is not waste for a tenant for life to plough up land held under lease, if the land was not ancient meadow or pasture at the date of the lease, although the land had continued as pasture land for more than twenty years before the commencement of the estate of the tenant for life.

THIS was an application for an attachment against the defendant, for breach of an injunction.

The bill was filed for the purpose, amongst others, of having the defendants restrained from committing waste, by ploughing up ancient meadow and pasture. The plaintiff had obtained an injunction against committing waste.

The principal defendant was tenant for life of the interest, under a lease of the land in question, for three lives, or forty-one years; and the plaintiff was entitled to it after his death. Both parties claimed under the will of the lessee. The other defendant was a near relative of the tenant for life, and resided with him on the land.

The lease bore date in 1798, and the land had been under tillage in 1795, but was then laid down with grass, and continued to be used as meadow, or pasture, till the death of the lessee, in the year 1819; who, by his will, bequeathed his interest under the lease to the defendant for life, with remainder to the plaintiff for the residue of the term, without any restriction as to the manner in which the interest was to be enjoyed.

[By consent an order of reference to the Master was made to enquire and report, whether the land in question was ancient meadow, or pasture.]

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The Master reported that two fields, part of the land in question, were ancient pasture, as between the plaintiff and defendant; that they had been under tillage in the year 1795, but were at that time laid down in pasture, and continued in that state until the death of the testator, in 1819.

The defendant now moved, that the report should be sent back to the Master, to be reconsidered, upon the ground, that these fields, being held under a farming lease, and having been in tillage three years before the date of the lease, were not ancient pasture.

MORRIS
v.
MORRIS.
June 22.

Mr. Blackburne, Mr. Warren, and Mr. Hogan, for the defendant :

This land had been under tillage three years before the lease was made to the testator : if he was now alive, he might break it up, if he pleased. It would be inconsistent to hold, that the defendant, to whom the farm was bequeathed for life, without any restriction, should be prevented by the plaintiff from tilling it ; though as against his landlord, he might use it as he pleased.

* * There is no reported case at all similar to the present ; as in all the cases in the books relative to waste, the property was fee simple ; but this land is held under the usual farming lease, without any restricting clause, and subject to a rent.

[241]

Mr. Tickell and Mr. Farrell, for the plaintiff :

This is, at all events, equitable waste, as between the tenant for life and remainder man. It is not necessary, in order to prove that land is ancient meadow or pasture, to shew that it had never been ploughed up within the memory of man : *Atkins v. Temple*,† *Fermier v. Maund*.‡ The cases in Rolle and Coke upon Littleton, are either obsolete, or inapplicable in equity.

THE MASTER OF THE ROLLS :

I consider, that in fee simple estates, a continuance in pasture for twenty years during the life of the donor or testator, impresses on land the character of ancient pasture ; and have frequently acted on the principle. If the period was less than twenty years, the case is open to evidence of intention, but not otherwise.

Destruction of the inheritance is not always waste. For instance, a tenant for life of a mine may work it, and possibly consume it, and leave nothing for the remainder man. The difference depends on the different nature of the property. This

[242]

† 1 Ch. Rep. 13.

‡ 1 Ch. Rep. 116.

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v.
MORRIS.

land is held under a farmer's lease of the ordinary duration, and was a tillage farm when let by the landlord.

I cannot reason on the case as if it was a fee simple estate, or held for a long term of years. In this case, the character of the land depends either on the dry legal question, whether it is ancient pasture, or else on the intention of the testator? It does not depend on the latter, because none is expressed in the will. The question is, therefore, one of mere law; and I am not aware of any case, in which, in the absence of express stipulation, an act has been held to be waste, as between a tenant for life, and a remainder man, which, at the same time, would not be waste, as between the same tenant for life, and his landlord.

Mr. Tickell :

Still this is the case of a person holding but a partial interest; and there is no difference in principle, whether the lease is for forty or four hundred years: *Pratt v. Brett*.† Suppose, that instead of both parties claiming under a will, the testator had made a lease to the defendant for his life, and then devised the reversion to the plaintiff, there could be no doubt of the plaintiff's right to have the land kept in pasture.

[243] THE MASTER OF THE ROLLS :

I would willingly interrupt what is doing, if I could; but there is no authority in support of the principle now contended for, nor any decided case which at all approaches the present. Nothing can be more dangerous to the administration of justice in a court of equity, than the adoption of a new principle, without the most minute investigation.

The difficulty seems to have been caused by a supposition, that the right to prevent a party in possession from breaking up meadow or pasture land, is incident to the interest the party has in the land. Whereas it is an incident to the land itself; and the only object of the law originally was, to preserve the land for the remainder man, in the state and under the description by which it was limited to him; and on that account it is, that a

† 17 R. R. 187 (2 Madd. 62).

tenant for life in possession will not be allowed to alter the nature and quality of the land.

It is admitted, that as between landlord and tenant, this is tillage land. It can only be held ancient pasture on account of the relative interest of plaintiff and defendant; and if it was decided on that ground, it would follow, that the farm which was tillage land immediately before the testator's death, would become ancient pasture immediately after, merely on account of that event having taken place.

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r.
MORRIS.

TRAPAUD v. CORMICK.

(1 Hogan, 277—278.)

A judgment creditor who has received money on account from the receiver, will not be considered as if he had been in possession; and is not entitled to more than the penal sum in his bond, though there is much more due to him.

1825.
July 7, 8.
Rolls Court
(Ireland).
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M.R.
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MR. WARREN, on behalf of the defendant, moved that it should be referred to the Master to review his report in this cause on the points specified in the notice, the principal of which was, that the Master had reported Baynes, a judgment creditor, entitled to the full amount of the penalty in his bond, although he had been paid a large sum on account of interest.

Under the decree to an account in this cause, Baynes was reported as entitled to 1,602*l.* 1*s.* 2*d.* being the full amount of the penal sum in his bond. On the 27th of April, 1820, there was a final decree for a sale, and the appointment of a receiver; afterwards (on the 15th of May, 1820,) a receiver was appointed, who between that time and 1824, paid him 637*l.* 10*s.* 7*d.* by the consent of the defendant, for the purpose of inducing him not to press for a sale; and on that account the Master applied this sum towards the interest which fell due beyond the penalty amounting to 900*l.*; but the defendant insisted that it should be applied in liquidation of the sum reported due: *Clarke v. Seton*,† *Moore v. M'Namara*,‡ *Latouche v. Fitzgerald*.§

Counsel, on behalf of Baynes, insisted, that as he had been

† 6 Ves. 411 (see 3 R. R. 179).

2 Ball & B. 186).

‡ 12 R. R. 73 (1 Ball & B. 309,

§ 2 Ridg. P. C. 333.

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paid by the receiver, he should have the *same advantage as if he had been actually in possession: *M'Clure v. Dunkin*,† *Atkinson v. Atkinson*.‡

THE MASTER OF THE ROLLS :

It appears to me that rents received by the receiver in no respect differ from the fund produced by a sale: they form together a mixed fund, for the purpose of executing the decree. I hold that a judgment creditor a plaintiff (and a judgment creditor coming in under the decree is *quasi* a plaintiff) has no right to any thing beyond his penalty, unless he is in possession.

His Honor directed the application to be made before the Lord Chancellor, as Baynes rested on a case decided by his Lordship.

This motion was afterwards (on the 19th July) made before the LORD CHANCELLOR, who decided according to this opinion of the MASTER OF THE ROLLS.

HUTCHINS v. HUTCHINS.§

(1 Hogan, 315—318.)

A solicitor who has been discharged by his client, cannot be afterwards concerned against him in the same suit.

An application was made that Mr. Fisher, who had been the solicitor of the defendant, should be prevented from acting as solicitor for the plaintiff.

It was many years since Mr. Fisher had been the defendant's solicitor, by whom he was discharged, and he swore that he altogether forgot the nature and purport of the communications he then received; but believed that, as the present suit was then an amicable one, no secret, important to its defence, as at present constituted, was communicated to him by the defendant.

† 1 East, 436.

‡ 12 R. R. 20 (1 Ball & B. 238).

§ See *Little v. Kingswood Collieries*

Coy. (1882) 20 Ch. Div. 733, 52

L. J. Ch. 56, 47 *L. T.* 323.

1825.
 Nov. 22.

Rolls Court
(Ireland).
 M'MAHON,
 M.R.
 [315]

Mr. Wolfe, for Fisher, admitted that this order should be made, had Fisher retired from his former client; but insisted that the rule did not extend to the *case of a solicitor who was discharged: *Cholmondeley v. Clinton*,† *Robinson v. Mullett*,‡ *Beer v. Ward*,§ *Bricheno v. Thorp*; || and relied on the feeling at the Bar on similar cases.

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[*316]

THE MASTER OF THE ROLLS :

I conceive that the case of a conducting counsel, who had drawn the pleadings and was in the secrets of his client, and went over to the adverse party upon being left out, would be one of great difficulty to maintain.

The retainer of a solicitor *prima facie*, always implies confidence; but it may be made to appear that in fact none existed.

The question is, whether there has been a confidential communication of any facts not on the face of the pleadings? In this case, there has been adverse litigation; and my impression is, that there must have been confidential communications. I cannot call for, or permit a disclosure of what communications were made, so as to form a minute opinion on the particulars, but am bound to presume that they were of such a nature as a solicitor is not at liberty to disclose: the *plus* or *minus* of the confidence cannot be investigated without disclosing the facts confided. The rule is, that the solicitor must conceal the communications of his client, and that not for his own sake, but for the sake of his clients.

The law of evidence affords the best criterion for *coming to a right result on this subject. An attorney will not be allowed in civil or criminal proceedings to reveal the confidential communications of his client, without regard to the distinction, whether he has been discharged by him or not. No question can be entered into relative to the merits of the client, and his lips are sealed, no matter how the client has acted towards him. The principle of *Cholmondeley v. Clinton*, is, as I collect it, to render it impracticable for a solicitor to accept of a new and inconsistent engagement, which will almost inevitably lead to

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† 13 R. R. 183 (G. Cooper, 80, 19 Ves. 261).

‡ 18 R. R. 723 (4 Price, 353).

§ 23 R. R. 3 (Jac. 77).

|| 23 R. R. 69 (Jac. 300).

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the violation of this duty. This duty of a solicitor must be violated if the case of one party in a cause is conducted by the person acquainted confidentially with all the weaker parts and special circumstances of the title or case, of his opponent; and I cannot conceive how the solicitor can discharge his mind from the recollection of these points in giving the best advice which he can to the antagonist of his former client. It is clear, therefore, that these inconsistent relations ought not to be successively undertaken by the same person.

If the principle on which relief is given by injunction be sound, it seems difficult and inconvenient to make it depend upon the solution of the question whether the solicitor has retired from the client; or whether they have parted by mutual consent, or whether the client has changed him without any adequate cause, or has been compelled to dismiss him on account of misconduct or neglect. All these different cases, in fact, may arise; and the most general one which occurs is where, with faults on both sides, they part by mutual consent. Special cases, no doubt, *may arise, as in the case of *Robinson v. Mullett*, or where the client is exercising his right with manifest fraud; but I speak of general classes of cases.

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In the present case, I see nothing in the special facts to make it an exception to the decision in *Cholmondeley v. Clinton*, and I must

Grant the injunction.

1828.
Dec. 3.

STEELE v. SCOTT.

(2 Hogan, 141—143.)

Rolls Court
(*Ireland*).
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M.R.

[2 Hog. 141]

If a client by his conduct makes it impossible for his solicitor to continue any longer connected with him, and the solicitor in consequence refuses to continue the connexion, he will be considered as if discharged by his client, and will not be ordered to give up the client's deeds and papers until his costs are paid; but he must produce them to be used at the hearing, and for inspection.

THIS was a motion on behalf of the plaintiff, that William Woodrooffe, his late solicitor in this cause, should within one week deliver upon oath to J. V. Horan, his present solicitor, all the proceedings, and all deeds, evidences, papers, and writings whatsoever, which came into his hands, or which might, before

the hearing of this cause, come into his possession or custody, belonging to the plaintiff, and which relate to this cause, the said J. V. Horan giving a receipt to the said Wm. Woodrooffe for the same, and undertaking to hold the same when so delivered to him, subject to the lien of the said Wm. Woodrooffe for what should be found due to him upon the taxation of his bill of costs.

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It appeared by the plaintiff's affidavit, that Mr. Woodrooffe had carried on this cause until the month of June last, when he declined to proceed with it any further; that plaintiff then appointed his present solicitor; that Woodrooffe refused to give up the papers to enable him to prosecute the cause by another solicitor, unless the plaintiff *would pay him the amount of his costs, which he was then unable to pay; that the cause would now be ready for hearing, if the necessary papers were obtained; and that he was advised he could not safely proceed to a hearing without the papers.

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Mr. Woodrooffe, by his affidavit, admitted that he had refused to be further concerned for the plaintiff, and that he withheld the papers because the plaintiff had not paid him his costs; but said that the plaintiff's conduct (of which he stated the particulars in his affidavit) made it impossible for him to continue as his solicitor, in consequence of imputations cast upon him.

Mr. Furlong, for the plaintiff:

This is the common case of a solicitor who has discharged his client; and the rule is, that he cannot make use of his lien to prevent him from obtaining justice, because his costs have not been paid: *Colegrave v. Manley*,† *Commerell v. Poynton*.‡

Mr. J. Richards and *Mr. Costollo*, for Mr. Woodrooffe:

If a client chooses to discharge his solicitor, he cannot take the papers out of his hands until he pays him the amount of his bill of costs: *Lord v. Wormleighton*; § and it makes no difference whether the plaintiff formally enters a rule to change his solicitor and appoint another, or whether he makes it impossible that his

† 24 R. R. 83 (T. & R. 400).

§ 23 R. R. 146 (Jac. 580).

‡ 18 R. R. 1 (1 Swanst. 1).

STEELE solicitor should longer continue connected with him, by conduct
v.
SCOTT. which amounts substantially to a discharge.

[143] THE MASTER OF THE ROLLS :

The conduct of the plaintiff fully justifies Mr. Woodrooffe in refusing to be any longer connected with him as his solicitor. This is more like the case of a solicitor discharged by his client, than of a solicitor who refused to be longer concerned for his client, because he would not advance him money, or he had quarrelled with him. I consider that the plaintiff by his conduct to Mr. Woodrooffe, has substantially discharged him.

The solicitor cannot prevent the progress of the suit, because he may be ordered to produce the papers for use in the progress of the suit; but this motion must be refused, with costs to the solicitor, upon the facts disclosed in his affidavit.

The plaintiff afterwards appealed from this order, and at the same time moved in the alternative, that Mr. Woodrooffe should be ordered to produce the proper papers upon the hearing of the cause, and for the inspection of the plaintiff's solicitor and counsel, previously thereto, and leave the same with the plaintiff's six clerk for that purpose, when the LORD CHANCELLOR confirmed the order of the MASTER OF THE ROLLS, but granted the relief sought in the alternative, which was not any part of the original motion at the Rolls.

1829.
Feb. 10, 19, 21.
March.

Rolls Court
(Ireland).
M'MAHON,
M.R.
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LORD KINGSTON v. LORD LORTON.†

(2 Hogan, 166—185.)

A testamentary precatory trust not necessarily arising upon the face of the will but dependent partly upon matters and events collateral to and independent of the will is not an express trust, and might thus be barred by the lapse of time even previously to modern Statutes of Limitation.

[THE plaintiff's grandfather, Edward, late Earl of Kingston, was seized in fee simple of the demesne of Kingston Lodge, and

† But an implied trust arising upon the face of a will (*Commissioners of Charitable Donations v. Wybrants* (1845) 2 J. & Lat. 182), or a trust resulting upon the face of a will (*Patrick v. Simpson* (1889) 24 Q. B. D.

a great quantity of land thereunto adjoining, and was also possessed of a considerable personal estate.

The said Earl of Kingston duly made his will, dated the 20th day of June, and thereby devised all his lands and hereditaments unto his brother, Henry King, and his nephew, James Stewart, their heirs and assigns in trust, to raise as much money thereout as should be sufficient to pay such deficiency as his personal estates should prove insufficient to pay the debts and legacies, and funeral expenses; and after such payment then in trust, to convey so much of his said real estates as should remain undisposed of for the purposes aforesaid, unto his only son Robert, Lord Kingsborough, the father of the plaintiff, his heirs and assigns for ever. And the said testator gave and bequeathed the residue of his personal estate unto his said son, Robert, Lord Kingsborough]; and the testator appointed his said brother, Henry King, and his said nephew, James Stewart, executors of his said will and testament; and by a codicil to his said will, bearing date the 6th day of August, 1797, and duly executed and attested, gave several specific legacies; and he concluded the said codicil in the words following:

“And whereas, my son will have a considerable increase of income at my death, I leave to my grandson, George King (the plaintiff), an annuity or rent charge of 1,000*l.* a-year; and do charge all my unsettled estates with the said annuity, with power to distrain and drive in case of non-payment, to be paid half yearly, on every 1st day of May and 1st day of November, the first payment thereof to be made on such of the said days, as shall happen next after my death. I recommend to my son, that if he chooses to keep the house and demesne of Mitchelstown, that he do within twelve months after my decease, make over by deed to my grandson, George King, my demesne of Kingston Lodge, and such other adjoining lands as I have lately had a map made of by Mr. George Hillas, land surveyor, and all my islands

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225, 39 L. J. Q. B. 7, 61 L. T. 686)
= an “express trust” within the
meaning of that expression as used in
Modern Statutes of Limitation, and
therefore not barred by mere

lapse of time under those statutes,
apart from the equitable doctrine of
acquiescence which is expressly pre-
served by s. 27 of the English Statute,
3 & 4 Will. IV. c. 27.—O. A. S.

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in Lough Key, that are not comprised in said map, as an appendage to the demesne."

The house and demesne at Mitchelstown, mentioned in the said codicil, was a part of certain estates, which the said Robert, Lord Kingsborough, was seized of, or entitled to, in right of his wife, Caroline, then Lady Kingsborough, and which he was then in possession of.

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The map referred to in the said codicil * * comprised various lands adjoining to, or in the neighbourhood of Kingston Lodge.

[The plaintiff's grandfather, Edward, late Earl of Kingston, died on the 17th day of November, 1797, and his said will and codicil were duly proved on the 4th day of August, 1798, in the Prerogative Court in Ireland, by the said Henry King, who] got in and received the whole of the personal estate of the said testator, and applied the same towards the discharge of the testator's debts, legacies, and funeral expenses, except such of his debts as were charged on his said settled estates, without having recourse to a sale of the said testator's unsettled real estates for that purpose; but a considerable portion of the rents of the said unsettled real estates was applied in making good the deficiency of the personal estate of the said Edward, Earl of Kingston, for payment of his debts; and the other unsettled real estates of the said Earl Edward, were more than sufficient to supply any deficiency of the personal estate of the said Earl Edward, for the discharge of his debts, without resorting to the said lands of Kingston Lodge, and the other lands claimed by the plaintiff.

The testator's said son [Robert] upon the death of his father succeeded to the title of Earl of Kingston.

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The said Robert, late Earl of Kingston, [was immediately upon the decease of his father] let into possession by the said Henry King, and the said James Stewart, of the said demesne of Kingston Lodge, and the said lands adjoining thereto, comprised in the said map made by the said George Hillas, the said islands in Lough Key, and the other estates devised by the said will; but no account was then taken of the personal estate and debts of the said Edward, Earl of Kingston, nor was it then ascertained

whether it would be necessary to resort to the unsettled real estates for the discharge of any of his debts.

[The said Robert, late Earl of Kingston,] elected to keep and did keep the said house and demesne of Mitchelstown, and continued in possession thereof, or in the receipt of the rents and profits thereof until the time of his death; but did not make or execute any conveyance of the said hereditaments and premises to the plaintiff, but continued in possession of the same, or in receipt of the rents and profits thereof until his death.

The said Henry King and James Stewart never, either jointly or separately, executed any conveyance to the said Robert, Earl of Kingston, of the unsettled estates.

[The said Robert, late Earl of Kingston, made his will, dated the 1st day of January, 1798, and thereby devised all his lands and hereditaments, in the counties of Roscommon and Sligo, to the use of his second son, the defendant, Robert King (afterwards the Right Hon. Robert, Viscount Lorton) and his assigns for his life, without impeachment of waste; and after his decease to the use of his first and every other son in tail male, and after giving several specific and pecuniary legacies, the testator bequeathed all the residue and remainder of all his real and personal estates of every kind whatsoever, unto his said son, Robert, his heirs, executors, administrators, and assigns, and nominated him sole executor of his said will.

The said Robert, late Earl of Kingston, died on the 10th day of April, 1799, leaving his wife, Caroline, him surviving, who continued in the enjoyment and possession of the said house and demesne of Mitchelstown until the time of her death, which happened in the year 1828; leaving the plaintiff his heir-at-law, him surviving.]

The defendant, Robert, Lord Lorton, duly proved his said will in the Prerogative Court of Ireland, on the 10th day of May, 1799, and took upon himself the execution thereof; and immediately upon the death of the said Robert, Earl of Kingston, entered into the possession of the said demesne of Kingston Lodge, and the said lands adjoining thereto, [or into the receipt of the rents and profits thereof; and continued in the possession thereof, or in the receipt of the rents and profits thereof; and no account was

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taken of the personal estate and debts of the said Edward, Earl of Kingston, plaintiff's grandfather; nor was it ever ascertained how much of the rents of the unsettled real estates were applied in discharge of the debts of said Earl Edward.

The defendant, Robert, Lord Viscount Lorton, had issue, several children, and his eldest son, Robert King, was one of the defendants.

The plaintiff filed his bill on the 21st of October, 1828, claiming to be in equity entitled in fee simple to the said demesne of Kingston Lodge, and the said lands adjoining thereto comprised in the said map, and to the said islands in Lough Key, under the codicil to the will of his grandfather, the said Edward, Earl of Kingston.]

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To this bill the defendant demurred for want of equity.

Lefroy, Serjt., *Blackburne*, Serjt. and *Mr. Pennefather*, for the defendant.

Mr. Warren, *Mr. Crofton*, and *Mr. King*, for the plaintiff.

THE MASTER OF THE ROLLS [after stating the facts above mentioned, said:]

The bill further states the death of Henry King, the surviving trustee, in February, 1821, and that thereupon the plaintiff became entitled as the heir of the surviving trustee. Two cases are, therefore, alleged upon this record, one as heir of the surviving trustee, Henry King, and the other as devisee of the lands in question under the codicil to Earl Edward's will, dated the 6th of August, 1797. No relief is sought as the heir of the surviving trustee, nor is any account of the trust prayed, and the bill in all that relates to the case as heir, appears to be merely for discovery. At the end of the prayer it is added, "that all necessary accounts may be directed;" but no indication is given as to the nature of these accounts. The latter case of devisee under the codicil to *Earl Edward's will, presents the real question between the parties, and, therefore I proceed to consider it in the first instance.

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The question is, whether the plaintiff, Earl George, can now be received to assert his title in a court of equity as devisee, under this codicil of Earl Edward, executed in August, 1797,

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against the defendant, Lord Lorton, who entered into possession of the lands in question, immediately after the death of Earl Robert, in April, 1799, and into receipt of the rents and profits thereof, and has ever since that time continued, and is now in possession or in receipt of the rents and profits thereof. It is alleged upon the bill, that no conveyance was executed by the trustees under the will of Earl Edward; and, therefore, considering the title of the devisees to the trust estates, under the wills and codicil of Earl Edward and Earl Robert, it becomes material to consider, what are the principles of a court of equity in giving effect to length of possession in a defendant as a bar to such a suit. Instead of opening a discussion upon this extensive topic, I will rather profit by the recent judicial discussions which this subject has received, and by the final adjudication in the House of Lords upon the subject, and thus abridge my view of the subject within a narrow compass.

[After dealing with the question of the bar of equitable titles by lapse of time, which is now practically covered by modern Statutes of Limitation, except in the case of express trusts,

THE MASTER OF THE ROLLS said :]

But it has been argued, that the trustees, Henry King and James Stewart, having the legal estate, the possession of Lord Lorton must be deemed as permissive and as tenant at will, and that no case of adverse possession can arise. I conceive the law to be distinctly otherwise, and that the existence of a trust or of an outstanding mortgage does not prevent the operation of an adverse possession between conflicting cestui que trusts, or between conflicting claimants of the equity of redemption, and that the trustee holds for the party who thus acquires the title by this adverse possession of twenty years. Without enlarging on this topic, it appears to me sufficient to say, that length of time could never operate in a court of equity in obedience to the Statute of Limitations if this were not so, and that it is the specific doctrine decided in *Lord Cholmondeley v. Clinton*.†

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But it is argued that, admitting the law to be as I have stated it, still that the plaintiff's case forms an exception, and that there

† 22 R. R. 84 (2 J. & W. 1).

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can be no adverse possession, because that the plaintiff, Earl George, and the defendant, Lord Lorton, stand in relation of the cestui que trust and trustee, and this appears to be the principal point in the case. It must, as I conceive, be admitted, that the possession of the express trustee cannot be deemed as adverse to his cestui trust, nor the possession of the tenant to his landlord, although the one does not account, nor the other pay the rent. But this principle must, I *apprehend, be applied only to express and direct trusts, and cannot be extended to implied or constructive trusts raised by the construction of a court of equity upon the intentions of a testator, or the relative dealings of parties; for where the trust is express, the obligation to keep accounts is direct, and the possession is in privity; but when the trust is implied or constructive, the obligation to account is not explicit, but is constructively raised by the judgment of a Court, and there is no privity but what is superinduced by the decree of the Court, and therefore in all such cases the mischiefs, injustice, and uncertainty which would attend an unlimited right to sue at any distance of time directly apply, and demonstrate the necessity of a limitation of time; and, therefore, the rule has hitherto, I apprehend, been only applied to express and direct trusts. In *Beckford and others v. Wade*,† Sir WILLIAM GRANT says: “It is certainly true, that no time bars a direct trust as between cestui que trust and trustee; but if it is meant to be asserted, that a court of equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be.” It, therefore, remains to inquire upon what grounds Lord Lorton can be alleged to be the express and direct trustee of the plaintiff. Lord Lorton was never made his express trustee, nor was he ever expressly directed by any will or instrument to execute any deed to the plaintiff. Upon the allegations in the bill, his possession must be referred either to that of an equitable disseisor, a trespasser, or as devisee of Earl Robert, entering under a claim of title to the lands in *question as part of the lands and premises over which his testator had power and

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† 11 R. R. at p. 28 (17 Ves. 97).

dominion. By construction he may be made a trustee, but there is no direct or express relation between the plaintiff and defendant in this respect; and, on the contrary, the allegations negative such a relation, and shew an entry under a claim of adverse title.

But it is argued, that the words of recommendation used in the codicil of Earl Edward, of the 6th August, 1797, are imperative, and that thus a direct and express relation of trustee and cestui que trust, is created between the plaintiff and defendant. It is my opinion, that the words of recommendation used are imperative and mandatory, the property being ascertained, and the object certain, and that the devise in this codicil, to use the words of Lord ELDON, in the case of *Dashwood v. Payton*,† creates “an imperative trust upon express condition,” and the nature of such a trust Lord ELDON explains thus: “So as to precatory words which in equity have been held to be imperative, when the object and subject are certain, those are cases of trust raised either out of the disposition of an interest, or out of what amounts to a direction to elect.” This is not a mere devise by words of recommendation, but it is also contingent, and dependent upon the will and choice of the beneficial devisee. In the mean time the devisee is to hold for his own benefit as owner in fee, but upon this contingency occurring, which depends not upon the testator’s discretion, but his mere will and choice, then the words of recommendation commence their operation as imperative.

Construing these words of recommendation as imperative, the period when the contingency shall arise for this devise to operate on, must depend upon matters quite *dehors* the will, and upon facts to be proved by witnesses, and it is a contingency quite collateral to the will. It is argued, that at the end of a year this devise operated conclusively, but it is not difficult to imagine many questions of fact that may arise if the litigation had then existed, exclusive of such question as may be made upon the quantity of the estate to be conveyed to the plaintiff. The material consideration is, that questions of fact to be proved, might have arisen between the parties as to the happening of this contingency. In order, therefore, to avoid the bar of twenty-nine years adverse possession in the defendant, the plaintiff

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† 11 R. R. 145 (18 Ves. 27).

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would upon this part of the case be bound to shew, first, that words precatory or recommendatory accompanying an express beneficial devise to a devisee, create an express direct trust which exclude the application of the Statute of Limitation, and for ever render the property inalienable to any third person ; and, secondly, that it makes no difference that these words of recommendation depend for their operation upon a contingency subjected to the mere will and choice of the beneficial devisee, and which is the subject of evidence ; and that this direct express trust exists *ad infinitum*, against every alienee after all witnesses are dead, and all possibility of investigation is closed, though sustained by an adverse possession of twenty-nine years. Now, no authority has been cited for either of these positions, and when the doctrine of the Court is examined upon its principle, or upon the judicial opinions delivered upon precatory or recommendatory words, I think it will not be found that these positions *can be sustained ; and if both are not, the plaintiff fails in my judgment. The general run of cases in which the question has arisen is where an absolute interest is given to the devisee, and afterwards words of recommendation superadded, which being treated as mandatory with reference to the object and subject specified, reduce this interest to a life estate. Now in the general course of such cases, the devisee to whom the words of recommendation are addressed, takes for his own benefit, and the question is between him and the object recommended ; for if the recommendation be uncertain or insufficient, or invests him with full discretion to act or not in the nature of an absolute power, the devisee takes for his own benefit, and therefore the litigant parties to such a question are the devisee and the objects recommended. If the estate of the devisee be for life expressly, and a discretionary power is given as to the fee the heir takes : *Crossling v. Crossling*.† This appears to me both in form as well as substance, to distinguish such rights from the mere relation of trustee and cestui que trust ; the express direct trustee whose possession cannot be adverse takes no benefit, and has no interest, and there is no judicial opinion required to make him a trustee, and if the trust fails no benefit results to him, but it must go to the heir or next of kin of

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† 2 R. R. 88 (2 Cox, 396).

the person who created the trust. Now in both these particulars, the contrast appears to me to be strong as to the devisee of the fee for his own benefit, subject to words of recommendation. I have already stated the words of Lord ELDON in *Dashwood v. Payton*. In *Pierson v. Garnett*,† Lord KENYON, the Master of the Rolls, says : “that where the property to be given is certain, and the objects to whom it is to be given are certain, *then a trust is to be created.” This doctrine is emphatically laid down by Lord ELDON in *Morice v. The Bishop of Durham*,‡ and the distinction strongly drawn between a devisee subject to words of recommendation and an express trustee, as to the consequences if the trust fails, and in all such cases the Court has to decide whether it is a discretionary power, or an implied trust, and therefore if it is a trust, it is raised by the Court.

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With respect to the second position, I apprehend it cannot be sustained, and that it is directly opposed to authority. If the devisee, as Earl Robert, holds for his own benefit in fee, but liable to be affected by a transfer of his interest, on an implied trust, by reason of words of recommendation ; upon the happening of a contingency, dependent on his will, but which involves the proof of facts and the possible examination of witnesses, I apprehend that upon the principles so clearly laid down in *Beckford and others v. Wade*, adverse possession in his alienee by a deed or will for 29 years, will bar any claim against the title of such alienee or devisee. This appears to me the application of the doctrine laid down in that case, and founded upon the policy of the Statute of Limitation. It is the principle of the decision of *Davie v. Bradshaw and wife*, to which I have already referred,§ and of *Lord Cholmondeley v. Lord Clinton*, and the case of *Bonney v. Ridgard*,|| appears to me to shew that in a case where a purchaser would be clearly held a trustee for the children of the testator under a constructive trust, yet, that twenty years adverse possession constituted a bar. The short substance of the case was, that a widow made executrix by her first husband, with

† 2 Br. C. C. 45.

the original report.—O. A. S.

‡ 7 R. R. 232 (9 Ves. 399, 10 Ves. 522, 536).

|| See 11 R. R. 28 ; 14 R. R. 247, n. (1 Cox, 145).

§ No such reference appears in

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KINGSTON
v.
LORD
LORTON.
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directions to sell a *leasehold interest for the benefit of herself and their children marries a second husband, and joins him in selling to Barnard, a creditor of the husband; twenty years and more elapse; it was held to be a fraud in the purchaser which would have made him a constructive trustee without doubt for the children; and yet length of possession barred, and Lord KENYON reversed the decree of Sir THOMAS SEWELL. This case is reported from Cox's note by the MASTER OF THE ROLLS in *Beckford and others v. Wade*,† and it is cited in *Andrews v. Wrigley*. Upon these views of the plaintiff's case upon this record, it appears to me to follow, that the possession of Lord Lorton since April, 1799, must be deemed adverse to the plaintiff both in fact and law, that he entered upon the death of his testator, Robert, in April, 1799, as upon lands over which his testator had power and dominion, and that his possession has been since adverse and uninterrupted; for the bill states that he entered immediately after the death of Earl Robert, and in a subsequent part of the bill it is stated that Lord Lorton and Robert King, his son, now claimed to be entitled as devisees of Earl Robert.

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It only remains for me upon this part of the case to observe, that holding as I do, that the words "I recommend," in the codicil of Earl Edward, were imperative, upon the occurrence of the express condition therein mentioned; the probable weakness or inferiority of the defendant's title as founded on the will of Earl Robert, against this codicil of Earl Edward, constitutes, in my view, no part of the present question, which turns upon the bar of upwards twenty years adverse possession, and I conceive it would be erroneous to *confound the probable invalidity of Lord Lorton's original title with the bar. If the title were clear and unquestionable, it would want no protection from time, but the bar of upwards of twenty years adverse possession is available by reason of its imperfection, and constitutes in itself a good title. The result is, therefore, that the bill stating the facts of this adverse possession, without any sufficient matter to avoid its effect is demurrable.

As to the second case of the plaintiff, as surviving trustee in

† See 11 R. R. 28.

the will of Earl Edward, it appears to me to be exposed to a demurrer upon this alternative view: it is either an ejectment bill by an heir-at-law who wanted discovery and no relief as to the lands to be included in his ejectment, with twenty years adverse possession against him; or it is a bill in the character of the heir of the surviving trustee, but stating expressly that no trust remains to be executed as to the lands in question, and praying no relief upon the foot of that trust; and in either view is exposed, in my opinion, to a demurrer. The result, therefore, is, that I allow the demurrer with costs, pursuant to the general order, bearing date the 13th of February, 1804.

LORD
KINGSTON
v.
LORD
LOFTON.

HALLIBURTON v. LESLIE.

(2 Hogan, 252—254.)

An infant may execute a deputation to a seneschal of his manor.

THIS was a motion by the receiver for a reference to the Master to inquire and report whether it would be for the benefit of the minor defendant (the inheritor) and his estate, that a seneschal should be appointed for the manor of Tarbert, in place of the last seneschal who had lately died, and that the Master should approve of a proper person to be appointed, and a proper deputation to said office, and that thereupon the minor or the guardian of his fortune should execute such deputation.

It appeared by affidavit that the manor in question was the property of the minor, and a manor court held therein, in which a seneschal presided ever since the manor had been granted to the minor's ancestor; that a seneschal had been appointed from time to time by the lord of the manor for the time being, and that the last seneschal who was appointed by the minor's father had lately died. It also appeared that the existence of the Court was a great convenience to the tenants of the estate, and that they would be much benefited by the appointment of a successor to the deceased officer.

Mr. Ball, for the defendant:

The appointment of a seneschal is for the public good, and as

1831.
July 28.

Rolls Court
(*Ireland*).
M'MAHON,
M.R.
[252]

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BURTON
v.
LESLIE.
[*253]

a deputation would not touch his interest, but would take effect from *an authority which he is trusted to exercise, it would be binding: Com. Dig. Infant, B. 6.

If any doubt should exist as to the operation of a deed, the appointment might be by parol, and would be only voidable. A steward may be appointed by parol: Com. Dig. Copyhold, R. 5. The law is not very anxious about the steward's deputation, or the lawfulness of his authority; it is enough if it appears correct. A grant by a steward who has color of title is good: Com. Dig. Copyhold, C. 5. If a seneschal be not appointed, it will be a loss to the tenants, and the right of appointment may be lost for want of being exercised. An infant is allowed to present to an advowson to prevent the lapse which would otherwise occur.

Mr. Warren, for the plaintiff.

THE MASTER OF THE ROLLS:

Is there any authority that an infant can appoint a seneschal?

Mr. Hinde, the receiver's solicitor, handed up to the Court *Lex Maneriorum*, by Nelson, published in 1733, and on page 69 there was a reference to an authority in 4 and 8† Reports, in support of a statement that the acts of a lord of a manor, as Lord, are good though he was an infant at the time.

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The order was—Refer it to the Master to inquire and report whether it will be for the benefit of the minor that a seneschal of the said manor should now be appointed *by him, and if so, in what manner, and under what regulations, and reserve further order until the return of the report.

The Master by his report, found that it would be for the benefit of the minor that a seneschal should be appointed, and that such application should be by deputation under his hand.

Dec. 20.

The report was this day confirmed; the Master was directed to approve of a fit and proper person to be appointed seneschal, and of a proper deputation to be executed by the minor, and the minor was directed to execute the same.

† 4 Co. Rep. 23, 8 Co. Rep. 63.

COURT OF EXCHEQUER IN EQUITY.

WARREN *v.* RICHARDSON.†

(Younge, 1—8.)

1830.
May 3.

[1]

Though a purchaser may have waived objections to title, yet he will not be compelled to accept a title which is clearly defective in respect of matter apparent on the face of the documents of title which have been unavoidably produced in proceedings to enforce specific performance of the contract.

In October, 1825, the plaintiff and defendant entered into and signed the following agreement :

“ Memorandum.—3rd October, 1825, Mr. William Warren, of No. 1, Upper Lark Hall Place, in the parish of Clapham, in the county of Surry, agrees to let the house in which he at present resides ; and Mr. Henry Richardson, of No. 81, Chancery Lane, in the liberty of the Rolls, in the county of Middlesex, agrees to take the above house, *on the following terms, viz. : Rent, sixty guineas per annum, payable quarterly. Term, twenty-one years, from Michaelmas last ; the time to be allowed for till possession is given. The stock and crop of the garden and any fixed improvements to be left at the end of the term. The usual covenants to be inserted in the lease. The tenant to pay for the lease and counterpart. Tenant's fixtures to be taken by appraisement in the usual way. The winter stock of vegetables to be included in the valuation.”

[*2]

On the 3rd December following, the defendant entered into possession. The draft of a lease, according to the terms of the agreement, was sent on the part of the plaintiff to the defendant ; who returned it, with some alterations, which were acceded to by the plaintiff ; and the draft was afterwards engrossed, and the engrossment tendered to the defendant.

The defendant having refused to accept the lease and to execute a counterpart, the plaintiff filed his bill for a specific performance of the agreement.

The defendant, by his answer, admitted the agreement and his

† *Scott and Alvarez's Contract*, '95, 2 Ch. 603, 64 L. J. Ch. 821, 73 L. T. 43.

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v.
RICHARDSON.

entering into possession, but alleged, that he was induced to enter into the agreement through certain misrepresentations and misstatements of the plaintiff. The defendant also stated, that, shortly after he had entered into possession, he discovered the misrepresentations of the plaintiff, and also, that he had improperly removed a number of fruit trees from the premises; and he therefore informed the plaintiff that he would not accept any lease, or hold the premises otherwise than as tenant from year to year. The defendant, by his answer, resisted the performance of the agreement, on the ground of the alleged misrepresentations of the plaintiff; and also, because the plaintiff had not shewn any title to the property; and that certain nuisances and inconveniences existed, of which the defendant was not aware when he entered into the agreement.

[3]

The cause was heard on the 19th November, 1828, and the principal point discussed was, whether the defendant, by taking possession of the property after the draft lease had been perused and returned by him, had not waived all objections to the title; and especially, whether he had not waived his right to call for the title of the plaintiff's lessor, it appearing from the evidence, that the plaintiff had only a lease of the property.

The Court being of opinion that the defendant had, by his conduct, waived all objections to the title, decreed the defendant specifically to perform the agreement of the 3rd October, 1825, and referred it to the Master to settle a lease of the house and premises according to the terms and conditions of that agreement; in the settling of which lease, the Master was to make to all parties all just allowances, and all parties were to produce before and leave with the Master, all deeds, books, papers, and writings in their custody or power, relating to the matter in question. The Master was to be at liberty to state special circumstances.

The Master, by his report, dated 18th March, 1830, certified that a draft of a lease had been laid before him on behalf of the plaintiff, as a proper lease between the parties, according to the terms of the said agreement. And that, under the direction contained in the decree, "that if any special matter should arise in settling the said lease, he should be at liberty to state the same;" the defendant had laid before him a statement of facts,

with a view of shewing what premises were demised by, and the rents and covenants contained in the lease under which the plaintiff himself held the premises in question; but he had received the same only with a view of shewing what premises were intended to pass and be comprised by the said agreement: and that, under the same direction, an affidavit of the plaintiff had been also laid before him, on behalf of the plaintiff, with a view of shewing what premises were *comprised in the lease in the pleadings mentioned, from John Lucas, therein named, to the plaintiff. And he further certified, that he had personally viewed and examined the premises in question, and he had perused such lease, for the purpose of ascertaining what premises were intended to pass and be comprised by the agreement. And he found, from the said lease, state of facts, and affidavit, and upon such view and examination as aforesaid, that the premises in question, the subject of the said agreement, consisted of the particulars mentioned in his report. And he certified, that he had settled the said draft lease from the plaintiff to the defendant, so laid before him as aforesaid, after consideration of such state of facts and affidavit, and such view and examination.

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v.
RICHARDSON.

[*4]

To this report, the defendant took six exceptions: The first of them, which was the principal exception, and the only one necessary to be noticed, being, that the Master ought to have certified that the statement of facts, mentioned in his report, was tendered by the defendant, and that he ought to have received the same as evidence to shew the particulars of the premises, rent, covenants, and conditions contained in the original lease, under which the plaintiff held the property in question; and by which lease and state of facts so laid before the Master, it appeared that the plaintiff held the premises in question, together with other premises, under a lease from John Lucas, for eighty years, from 24th June, 1818, subject to one entire yearly rent, and to the performance of, among other covenants, several special covenants therein contained.

The covenants applied generally to all the property, and the lease contained a power of re-entry by the landlord, his heirs and assigns, in case the rent should be in arrear for fifteen days, or on non-performance of any of the covenants.

WARREN The cause now came on for hearing, on further directions, and
 RICHARDSON. on exceptions to the Master's report.

[5]

Mr. Koe, and Mr. Russell, in support of the exceptions :

The difference between the original lease from Lucas to the plaintiff, and the draft of the lease from the plaintiff to the defendant, is such, that if the defendant were strictly to perform all the covenants in his lease, still there might be a breach of the covenants in the original lease, and a forfeiture and re-entry by Lucas. The property in question being also held with other property, at one entire rent, and with a proviso for re-entry for non-payment of that rent, or non-performance of the covenants as to any part of the property, it is clear a good title cannot be made : this point was decided in *Fildes v. Hooker*.† The defendant cannot protect himself from the covenants on the ground of want of notice, for he has notice from the agreement, that the plaintiff has only a leasehold title ; and it has been decided, that notice of a lease is notice of all the contents of that lease : *Hall v. Smith*.‡

Mr. Simpkinson, and Mr. Ellison, for the plaintiff, in support of the Master's report :

The defendant has no right, after the decree which has been pronounced, to investigate the title. The defendant waived, not merely his right to look into the lessor's title, but waived his right to look into the title of the plaintiff to do that for which he has contracted, viz. to grant him a lease for twenty-one years, with the usual covenants. He waived all the benefit which a reference on the title would have given him, which would have been not only that the plaintiff's lessor had a good title to the premises, but that the plaintiff's derivative title authorized him to grant the lease for which the defendant had contracted.

LORD CHIEF BARON :

[*6]

This is a suit for a specific performance *of an agreement by the plaintiff to make, and by the defendant to accept, a lease of

† 18 R. R. 214 (3 Madd. 193).

‡ 9 R. R. 313 (14 Ves. 426).

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 v.
 RICHARDSON.

a house and premises for twenty-one years. At the hearing there was a question, whether there should be a reference to the Master on the plaintiff's title. There had been some communications between them, and a draft of a lease had been sent by the solicitor for the plaintiff to the defendant, which he had examined. It was a question, whether the defendant was not bound to execute that specific lease? It seems, that upon the hearing the Court was of opinion, that the defendant was not entitled to a reference of the title, having waived it; and on the other hand, that the plaintiff was not entitled to make the defendant accept the lease, the draft of which had been prepared and sent to him. In consequence of these views, the reference to the Master did not give him any authority to look into the title, but only contained a direction to settle and approve the lease. The Master, with a view to settling the lease, has looked, to a certain extent, into the title. In every case of specific performance this must be done. He must ascertain, who are to be the grantors, and what premises are to be conveyed. So far the Master must necessarily go, and these things cannot be authentically ascertained without some examination of the title. He has done so in this case, and the result has been, that circumstances are disclosed which shew, that the plaintiff can make no valid title to the lease which he has undertaken validly and effectually to grant.

The Master has approved of a lease. Exceptions have been taken to this report by the defendant. I do not think it material to state particularly those exceptions. Their general nature is to object to the Master's report, because, in stating the evidence, he has stated it only with a view to ascertain the description of the premises comprised in the agreement: whereas, the defendant contends, he ought to have received the evidence, and stated its effect, with a view to shew, that the premises in question *were held by the plaintiff with other tenements, under one lease, so that the defendant would be affected by any breach of the covenants in respect of the other tenements; and, in consequence, that the plaintiff can make no title according to his agreement.

[*7]

This cause is also in the paper for further directions. The

WARREN
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RICHARDSON.

view which, after consideration, I have taken of the proper order on further directions, leads me to think it unnecessary to state the exceptions with more detail than I have done. With whatever view the facts were inquired into and have been stated by the Master, they shew most clearly, that the plaintiff cannot make a title to the defendant according to the contract. That now authentically appears on the record, and in the documents in the Master's office. The affidavits, and the original lease under which the plaintiff holds, establish it. This state of the cause places the Court in a situation of some embarrassment, and raises a question which is new to me, and, I have reason to believe, to some who have had the most extensive and the longest experience; and I have not been able to find any written or printed authority upon the subject. This is a suit for a specific performance. The Court was of opinion, that the defendant had waived what he would otherwise most clearly have had a right to, an inquiry into the plaintiff's title, that is, into his power to make a valid lease, according to his agreement, in other words, to put upon the plaintiff the burden of shewing his title, and proving it to be a safe one. Though the Court thought the defendant had by his conduct waived that right, it has now come out collaterally, but I think clearly, that the plaintiff cannot make a title according to his contract. It would be a great hardship upon a party, to force him to accept a title, which is ascertained to be defective. It would be contrary to all the rules which prevail upon the subject of specific performance. The *principles upon which courts of equity have proceeded on the subject of specific performance, do not make a decree for a specific performance the necessary consequence, under all circumstances, of an agreement. Circumstances of hardship often prevent it. They recollect that the party is not without remedy, for, though he should be refused a specific performance, he has left to him his action upon the agreement. What creates the difficulty in this case, is, that the conduct of the party had barred his right to the usual investigation into the title; and this defect is a defect of title. If the objection had been to the conveyance merely, the defendant would have had the full benefit of it without any doubt. But the objection is of another description. It

[*8]

is an objection to the title. It stands decided upon this record, that the defendant had waived his right to call upon the plaintiff for the production of his title: on the other hand, it is clear, that the plaintiff can make no good title, and if the defendant took it, it would be defective.

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v.
RICHARDSON.

I have somewhat hesitated as to the fit course to be pursued under these circumstances. As I have stated, I have not met with any authority exactly in point to conduct me. I think that the most just course, and the best supported by the rules prevailing on this subject of specific performance, and which is sustained by the greatest variety of analogies, is, in consequence of its appearing that the plaintiff cannot make the defendant a good title, to refuse a decree for a specific performance. A waiver of the defendant's right to make the plaintiff produce his title does not seem necessarily to import, that he will accept the title, though it should manifestly appear to be bad. I am of opinion, therefore, that I ought not to decree the execution of the lease settled by the Master, or any other lease, but that the bill should be dismissed. In consideration of the circumstances it ought to be

Without costs.

RAVALD v. RUSSELL.†

(Younge, 9—22.)

1830.
May 13, 17, 19.

A mortgagee in fee simple subsequently purchased the interest of the tenant for life of the equity of redemption. Held, that the remainderman could not claim to redeem the mortgage during the continuance of the tenant for life's estate, and that the right to redeem was consequently not barred by the lapse of nineteen years from the death of the tenant for life.

[9]

[THE facts of this case are concisely but sufficiently stated in the following judgment:]

The bill prayed a declaration, that the plaintiffs were entitled to the equity of redemption of [certain] mortgaged premises. * * *

[12]

To this bill the defendants pleaded the Statute of Limitations.: * * *

Mr. Boteler, and Mr. Wray, in support of the plea. * * *

[14]

† *Prout v. Cork*, '96, 2 Ch. 808, 66
L. J. Ch. 24, 75 L. T. 409.

‡ 21 Jac. I. c. 16.

RAVALD
v.
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LORD CHIEF BARON :

This is a bill for redemption of a mortgage. Husband and wife join in making a mortgage in fee. A fine was levied to the uses of that deed. This was in 1757. Some years afterwards, viz. in 1765, the husband and wife, by lease and release, conveyed the equity of redemption to the mortgagee. The wife's interest did not pass for want of a fine. The mortgagee got into possession between sixty and seventy years ago. The rights of the mortgagee from this time were, to hold the possession till he was paid his mortgage-money, and besides to hold the possession during the life of the husband, who was tenant by the curtesy, by force of the conveyance of the equity of redemption from the husband and wife, which, though invalid as to the wife, for want of a fine, was effectual to convey the marital rights of the husband.

[*20]

The wife died many years ago, before the year 1780, and then the husband died; and full nineteen years after the death of the husband, the heir of the wife, or persons claiming under him, filed this bill for a redemption, with its usual consequences. The defence is a plea of the Statute of Limitations. I have felt a strong inclination to sustain the plea, if a sufficient ground were furnished to me on which to rest it. It is important to the public, that an old possession should not be disturbed, and that full effect should be given to the statutes which have been passed for the purpose of protecting such possession, and quieting men in their rights. But, on *the other hand, unless the case comes properly within these statutes, by applying them, we take away without warrant the rights of parties.

If this were a mere legal question, I mean, if there had been no mortgage, if the defendant's title had been under the husband as tenant by the curtesy only, nothing can be more clear than that the heir of the wife might have entered and recovered the land. His right to enter would not have accrued till the death of the husband, tenant by the curtesy, in December, 1809; and therefore he would have been in sufficient time in November, 1829. He would have been within the twenty years provided by the 21 Jac. I. c. 16, s. 1. I cannot adopt the argument, that the time began to run during the life of the wife, or immediately

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r.
RUSSELL.

after her death, because the conveyance of 1765, purported to be a conveyance in fee. Being a conveyance by lease and release of an equity, I must view these deeds as having no other operation than what they legally might, that is, to convey the life estate of the husband. Therefore, I conceive the time of limitation, if this were a dry legal case, could run only from the death of the husband, and the determination of the interest legally conveyed.

But, besides being tenant *pur autre vie*, the person in possession was also mortgagee. In other words, the heir of the wife had no legal estate in reversion, he had only the reversion of an equity of redemption. The person in possession was the mortgagee, and the equity of redemption was divided into a life interest, which the mortgagee himself had, and the reversion, which the heir of the wife had. It is said, that immediately after the death of the wife, her heir might have redeemed, and as she died before 1780, time has barred his right to redeem, more than twenty years having elapsed since it accrued, and therefore that the plea is good. Cases have been cited to *prove that a reversioner, or remainder-man, may redeem in the life of the tenant for life. In all the cases cited to shew this as against the tenant for life, the decrees were made at a time when, upon the redemption, the Court compelled the tenant for life to pay, for the benefit of the owner of the fee, one third of the mortgage-money. This has long been altered, and it is now established, that the tenant for life is bound to keep down the interest, and to do no more. The remainder-man, or reversioner, has now no remedy to obtain an extinction of the mortgage. It is a corollary to the change in the rule of the Court, that the owner of the fee must give the tenant for life the option of redeeming. Whether the suit be brought by the mortgagee to foreclose, or by the owner of the fee to redeem, the tenant for life must always have first an option to redeem. Suppose the mortgage-money carried interest at five per cent., and no more than three could be obtained from public securities and the general transactions of the country, will it be contended that the reversioner has a right, as against the tenant for life, who is desirous to take the same measure, to call for an assignment of the mortgage, and so obtain a title to receive five per cent. from the tenant for life. If the tenant

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v.
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for life has actually paid off the mortgage, can the remainder-man force, by means of this Court, the tenant for life of the estate to assign his mortgage, so as to entitle the remainder-man to receive five per cent. when the tenant for life can make only three of the money which he shall receive.

[*22]

The supposed case shews, in my opinion, clearly, that from the time it was fixed that a tenant for life was bound to keep down the interest, and that only, he must always have the right of pre-emption, if I may use that expression. I think, therefore, the reversioner was not entitled forcibly to redeem the tenant for life. And if so, the foundation of the argument fails. The reversioner could *not redeem the mortgage till the death of the husband, and time has not barred him. I think the case of *Corbett v. Barker*, in this Court, reported in 3 Anstruther,† is exactly in point. I would not overrule it without a clear opinion that it was erroneous. It seems to me, that the weight of reasoning is with it; though this is a very hard case upon the defendants, as they have had a possession for nearly seventy years, founded upon a colourable though not a valid title.

Let the plea be overruled without prejudice to the defendants using the Statute of Limitations as a defence in their answer.

1830.
Nov. 17, 23, 24.
Dec. 7.

— v. ADAMS AND WITHERSTON.

(Younge, 117—124.)

[117]

Bills of exchange were accepted by A., for the accommodation of B., who, being one of the executors of C., and having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in B.'s possession, discounted the bills with the monies belonging to C.'s estate, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box : Held, that B. could not sever his character of an accommodation holder of the bills, from his character of executor, so as to enable him and his co-executors to sue as indorsees of the bills of exchange for a valuable consideration.

In 1819 the plaintiff was indebted to the defendant, John Moore Adams, and his then partner, John Griffin, in the sum of 180*l.*, for goods sold and delivered, and it being inconvenient for

† 4 R. R. 856 (3 Anstr. 755).

him to pay such debt, and being likely to have other dealings and transactions with them, he, in consideration of their forbearing to press him for payment of his debt, and for the accommodation of Adams and Griffin, accepted various bills of exchange, some of them being accepted in blank, upon an understanding and agreement that Adams and Griffin should, from time to time, pay and take up the bills so accepted by the plaintiff; and that the plaintiff should not be liable or responsible under such bills for more than the debt actually due from him.

—
c.
ADAMS.

For the purpose of taking up such bills, the plaintiff, from time to time, at the request of Adams and Griffin, accepted other bills drawn by him on Adams and Griffin; and Adams and Griffin, from time to time, procured the bills accepted by the plaintiff to be discounted, and with the proceeds took up and paid the first bills.

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On the 1st of November, 1822, the debt actually due and owing by the plaintiff to Griffin and Adams had been increased to 388*l.* 16*s.*

These accommodation transactions continued between the plaintiff and the defendant Adams, and his partner Griffin, down to the 16th November, 1826, when Adams and Griffin became bankrupts.

At the time of the bankruptcy, eleven bills, accepted by the plaintiff, amounting together to the sum of 1,077*l.* 19*s.* 8*d.*, were outstanding, of which four bills, amounting together to 392*l.* 18*s.* 9*d.*, were in the hands of Luke Howard, a *bonâ fide* holder, and one other of such bills, for the sum of 99*l.* 2*s.* 6*d.*, was in the hands of Magnus Thomas, also a *bonâ fide* holder.

The bill in the hands of Magnus Thomas was paid by the plaintiff, after deducting a dividend, amounting to 12*l.* 7*s.* 9*d.*, received by Thomas under the bankruptcy of Griffin and Adams.

The defendant Adams, together with Edward Bird and Godfrey Bird, and the defendant John Witherston, were the executors appointed by the will of Sherman Bird, of Southampton, Esq., the defendant Adams, as the only executor residing in London, being the acting executor.

According to the statement of the defendant Adams, and which was borne out by the evidence, the management of the

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v.
ADAMS.

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affairs of the testator, Sherman Bird, was left to the defendant Adams, and he had the principal management and control over the testator's estate and effects, from the testator's death, in 1824, to the bankruptcy. A box belonging to the executors of the testator, was kept *in the house in which the partnership business of Griffin and Adams was conducted, in which box the monies and securities belonging to the executors were deposited; and Adams having considerable sums of money from time to time belonging to the estate of the testator, and which, as received, were deposited in the box until the same could be appropriated, he, Adams, was, with such money, in the habit of discounting the bills belonging to the partnership of Adams and Griffin; and, according to Adams's statement, in his answer, as he drew the money belonging to the testator out of the box, he at the same time deposited therein the bills belonging to the partnership, which had been discounted therewith.

At the time of the bankruptcy, five of the plaintiff's bills, which were then outstanding and unpaid, were, according to the statement of the defendant Adams, among those which Adams had, in the manner aforesaid, discounted; such five bills amounting together to 489*l.* 8*s.* 11*d.*; and, as stated by Adams, there had not been a less amount of the plaintiff's bills in the box for the space of twelve months previously to the bankruptcy; the bills originally discounted with the monies belonging to the estate of the testator being, as they respectively became payable, taken out of the box, and others which had from time to time been accepted by the plaintiff substituted in their stead.

Griffin and Adams, at the time of their bankruptcy, were indebted to the estate of Sherman Bird, in the sum of 8,000*l.* and upwards, on the plaintiff's bills, and other securities.

After the bankruptcy of Griffin and Adams, the box containing the plaintiff's bills and other securities was placed by Adams in the hands of other persons, as the solicitors of the executors of Sherman Bird; and the plaintiff having been applied to for payment of three of the bills which had become due, amounting together to 295*l.* 15*s.* 2*d.*, *and having declined to pay the same, an action was brought on such three bills against the plaintiff, in the names of Godfrey Bird, John Witherston, and the defendant

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John Adams, as indorsees of such bills; and the plaintiff was arrested and held to bail.

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v.
ADAMS.

In Easter Term, 1828, the plaintiff filed his bill against the defendants Adams and Witherston, (Godfrey Bird being then deceased), praying that the five bills so accepted by the plaintiff for Griffin and Adams, and indorsed by Adams to himself and Witherston, and Godfrey Bird, might be delivered up to be cancelled, and for an injunction to restrain proceedings at law on such bills of exchange.

The defendant Adams, by his answer, stated the facts with respect to the mode in which the bills had been deposited by him in the box belonging to the executors, as above-mentioned. He also stated, that the 388*l.* 16*s.*, the balance owing by the plaintiff to Griffin and Adams, on the 1st November, 1822, afterwards became increased to 545*l.* 8*s.* 3*d.*, but which, by subsequent payments by the plaintiff, became ultimately reduced to 373*l.* 17*s.* 3*d.*, which was the actual amount of the debt due to Griffin and Adams. The answer alleged, that the bills were accepted by the plaintiff, and given generally for securing the debt due from him, and in consideration of the forbearance of Griffin and Adams in not pressing for the same. The answer admitted that, besides the money paid by the plaintiff, in reduction of the general balance, and besides the money paid by him to Thomas, in respect of one of the bills, amounting to 99*l.* 2*s.* 6*d.*, the plaintiff was liable to pay the four bills in the hands of Luke Howard, amounting to 392*l.* 18*s.* 9*d.*

The answer insisted on the right of the executors to enforce payment of the bills by the plaintiff.

The defendant Witherston, by his answer, expressed *his ignorance of the transaction, except as informed thereof by Adams.

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On the 12th June, 1828, an injunction was granted to restrain proceedings at law on the bills, on the terms of paying 276*l.*, the amount of the debt due to Griffin and Adams, after deducting the sum paid to Magnus Thomas, into Court; which condition was complied with, and the injunction accordingly issued.

The cause now came on for hearing. No evidence had been entered into by the plaintiff; but the defendants had examined

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ADAMS.

Griffin, who proved the several facts under which the bills had been accepted and discounted, to the effect above stated.

Mr. Simpkinson and Mr. Wigram, for the plaintiff :

The bills, being accommodation bills, as between the plaintiff and Griffin and Adams, and, therefore, bills which, if in the hands of Griffin and Adams, could not have been put in force as against the plaintiff, the defendant Adams cannot, in his character of executor of Bird, sue for the amount of them. The defendant Adams, as a partner in the house of Griffin and Adams, promised to provide for the bills when due, and, in the character of partner, he indorsed them to himself as executor; but he cannot, by such indorsement, be permitted to recover that, as executor, which, in the character of partner, he clearly could not.

For the plaintiff, were cited, *Sparrow v. Chisman*,[†] *Fuller v. Rowe*,[‡] *Jacaud v. French*,§ and *Richmond v. Heapy*.||

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Mr. Jervis, Mr. Treslove, and Mr. Davis, for the defendant Adams :

The defendant Adams, in his character of executor, stood in the situation of any other indorsee of the bills, and an indorsee of an accommodation bill, even with notice of its being an accommodation bill, is entitled to sue. The transaction with respect to the box is proved to have actually taken place, and was a fair transaction, and it is quite immaterial, so far as concerned the plaintiff, whether the bills were discounted by means of the box, or by the bankers of the executors.

(LORD CHIEF BARON : Suppose there had been a conditional indorsement, that is, suppose Adams had indorsed the bills to a third person, telling him that, when the bills became due, he, Adams, was to provide for them, what effect would that have on the transaction ?)

It is apprehended such a state of things could not exist, for no person would discount a bill under such circumstances, and

[†] 4 Man. & Ry. 206.

[‡] Peake, N. P. 107.

§ 11 R. R. 390 (12 East, 317).

|| 1 Starkie, 202.

the very object of the acceptance of these bills was for the purpose of their being discounted; and it would have been no accommodation if they were not to be discounted. It is proved, that Adams put the bills into the box at the time when he drew out the money; and there can be no difference, so far as the plaintiff is concerned, whether the bills were discounted by the box or by a third person.

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(LORD CHIEF BARON : The difference between the box and the third person is, that the box had all the notice which Adams himself possessed.)

The proposition in *Sparrow v. Chisman* is laid down too broadly. It was incumbent on the plaintiff in that case to shew the indorsement of the bill for a valuable consideration, and there was no proof of any value having been given. In the present case, we shew that the full consideration was given, which makes a material distinction. The other cases have no application.

Mr. Simpkinson replied.

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LORD CHIEF BARON :

The plaintiff rests his case on this point, that, supposing Adams himself to be the holder of the bills, he could not sue the plaintiff for the amount made payable by them; and this seems to be beyond dispute. It seems equally clear, that a *bonâ fide* holder of these bills, for a valuable consideration, without notice, could recover on them as against the plaintiff. The argument, on the part of the defendant, is, that the deposit by Adams was good, because it was made in strict accordance with the purpose for which the bills were given, that is, in order that Griffin and Adams might get them discounted for their benefit and accommodation, and that, whether they were discounted by the executors of Bird, or any other person, is immaterial. On the other side it is said, that if an explanation, founded on the truth of the case, had been given to the person discounting the bills, that they had been accepted for the consideration of Griffin and Adams, and that they were to provide for them, and the plaintiff was not

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to be called upon; then the holder of the bills would not be entitled to sue the plaintiff: and to this I accede, for the holder would, in that case, be in the same situation as Adams and Griffin. Admitting that a *bonâ fide* holder of these bills, for a valuable consideration, without notice, could clearly recover as against the plaintiff on these bills, I am of opinion that the executors of Bird do not sustain that character; for as, according to the rules of law, they could not sue upon these bills without joining Adams as their co-executor in the action, it appears to me, that Adams cannot so sever his character of co-executor of Bird from his character of partner with Griffin, as to prevent the executors of Bird from being affected with notice of the transaction, and with the terms and conditions upon which the bills had been accepted. A foundation for the jurisdiction of this Court being laid in the claim to *have the bills delivered up, I need not send the case to law.

I must decree the bills to be delivered up, and a perpetual injunction against proceedings on them. And I think Adams must personally pay the costs of the suit.

The decree was subsequently varied, by declaring that the defendant Adams, as the surviving executor of Bird, was entitled to recover such, if any, sum or sums of money only, which Griffin and Adams might have recovered, if they had not been bankrupts.

And it was referred to the Master to inquire whether the shop debt due from the plaintiff to Adams, or Adams and Griffin, had been satisfied either by money or by the discount of any acceptances of the plaintiff; and, if by acceptances, whether such acceptances had been paid. Or whether Adams and Griffin, or either of them, or their estate, remained liable to the same, and to what amount; with liberty to state special circumstances.

YOUNGE v. DUNCOMBE.

(Younge, 275.)

1831.
Jan. 26.

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By an agreement for the sale of an estate, the purchaser was to pay part of his purchase-money on the 24th December then next, when the conveyance was to be executed, and the residue was to be secured by a mortgage of the estate, payable at not less than twelve months from the date of the conveyance. The purchaser entered into possession immediately after the execution of the agreement, but, on some objections to the title, refused to pay his purchase-money. A bill was filed by the vendor for the specific performance of the contract, and more than twelve months having elapsed from the time when the conveyance ought to have been executed, the defendant was on motion ordered to pay the purchase-money into Court.

BILL for the specific performance of an agreement to purchase an estate. By the agreement 300*l.*, part of the purchase money, was to be paid on the execution of the agreement; 1,000*l.*, further part thereof on the 24th December, 1827, when the purchase was to be completed, and the conveyance executed; and 5,000*l.* residue of the purchase-money was to be secured by a mortgage of the estate, payable at not less than twelve months from the date of the conveyance, and with three months' notice prior to paying it off.

The defendant paid the 300*l.* on the execution of the agreement, and took possession, but, raising some objections to the title, he declined to pay the remainder of his purchase-money.

Mr. Hayter, on the part of the plaintiff, moved that the defendant should, within a fortnight, pay the 6,000*l.*, residue of the purchase-money, into Court. In support of the application, he cited *Wickham v. Evered*.†

Mr. Jervis opposed the motion, contending, that, as by the contract 5,000*l.* of the purchase-money was to remain on mortgage, for twelve months at least from the execution of the conveyance, and no conveyance had yet been executed, nor the title approved, the application was premature.

† 4 Madd. 53. See the cases on this point collected in *Greenwood v. Turner*, '91, 2 Ch. 144, 60 L. J. Ch. 51. 64 L. T. 261, some of which cases have already appeared in the Revised Reports. See 10 R. R. 82; 12 R. R. 282.—O. A. S.

YOUNGE LORD LYNDEHURST, C. B. :
r.
 DUNCOMBE.

I think this comes within the principle of the case which has been cited, and that the defendant ought to pay the purchase-money within a reasonable time ; he cannot be allowed to keep both the property and the purchase-money.

Let the defendant pay the purchase-money into Court within two months.

1831.

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COLLIER v. JENKINS.†

(Younge, 295—300.)

A person having contracted for the purchase of an estate in fee simple, in possession, free from incumbrances, died intestate before the completion of the contract: it subsequently appeared that a good title in possession could not be made in consequence of an outstanding lease, for the life of a person, at a low rent: a bill was filed by the heir-at-law of the purchaser for a specific performance of the contract, with an abatement from the purchase-money as a compensation for the lease for life, and seeking to have the purchase-money paid out of the personal assets of the purchaser: Held, that the purchaser could not have been compelled to perform the contract, and that the heir was not entitled to have it completed for his benefit.

[296] * * On the 17th November, 1828, Collier and Jenkins signed an agreement to the following effect: " The said Thomas Jenkins doth hereby agree to sell, and the said John Collier doth agree to purchase the inheritance in fee simple in possession of all the messuages or tenements, farm, lands, and premises, called or known by the name of Lydiat farm, situate in the parish of Coity, in the county of Glamorgan, now in the occupation of William Thomas, containing by admeasurement eighty-eight acres, two roods, and thirty-two perches, free from all incumbrances of what nature and kind soever; and also all that other messuage or tenement, farm, lands, and premises, called or known by the name of Park Gwylt, situate in the parish of Coity, now in the

† The heir's claim depends upon the question of conversion. If the purchaser was not bound to complete there was no conversion at the death, and the subsequent conversion of the

property will not relate back, even though the parties have substantially carried out the contract. *In re Harrison* (1886) 34 Ch. D. 214, 56 L. J. Ch. 341, 56 L. T. 159.—O. A. S.

occupation of Morgan David, save and except a certain field or close of land part of Park Gwylt aforesaid, called Rhos Broll, and containing by estimation, exclusive of the same field or close of land called Rhos Broll, ninety-three acres and twenty-four perches, free from all incumbrances, save and except and subject to a lease thereof, heretofore granted for the lives of William Morgan, aged seventy-six years or thereabouts, and Susannah his wife, aged seventy-three or thereabouts, and the *life of the survivor or longest liver of them ; together with the rights, members, and appurtenances to the same premises respectively belonging or appertaining, at or for the price or sum of 3,500*l.* which hath been this day paid to the said Thomas Jenkins, and which he the said Thomas Jenkins doth hereby acknowledge ; the said John Collier being fully satisfied with the title of him the said Thomas Jenkins to the said premises. And the said Thomas Jenkins doth promise and agree to execute such proper conveyances and assurances of the said premises unto the said John Collier, his heirs and assigns, as he or they shall direct, free from all incumbrances, except as far as regards Park Gwylt, as before excepted, as soon as the same shall have been prepared, and the said Thomas Jenkins shall have been requested so to do. And it is hereby agreed that all such conveyances and assurances as aforesaid, shall contain all usual and other proper covenants for the title, quiet enjoyment, and further assurance, and shall be prepared by and at the expense of the said John Collier. And it is further agreed that the said John Collier shall be entitled to the rents and profits of Lydiat farm aforesaid, and to the rents, duties and heriots, payable by virtue of the said lease for and in respect of Park Gwylt aforesaid, from the 25th day of March now last past ; up to which time all rates, taxes, assessments, and other outgoings, shall be discharged by the said Thomas Jenkins."

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[No part of the sum of 3,500*l.* mentioned in this agreement, and therein stated to have been paid, was actually paid to Jenkins; but it was arranged between Jenkins and Collier, that the share in a colliery to which Jenkins had been admitted by Collier as his partner, should be taken as payment and satisfaction to the extent of 2,000*l.* of the purchase-money.]

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John Collier died intestate on the 27th November, 1828, before any conveyance or any further agreement had been executed, leaving the plaintiff his eldest son and heir-at-law ; and, after his death, administration to his personal estate was obtained by his widow Rachel Collier.

Subsequently to the death of John Collier, it appeared that Lydiat farm, which had been represented to be free from all incumbrances, and was so contracted to be sold, was subject to a lease for the life of one Mary Griffith, at a very low rent.

The bill was filed by the heir-at-law of John Collier against Jenkins, and against the widow and administratrix, and the next of kin of John Collier, and it sought the completion of the purchases for the benefit of the plaintiffs, and a deduction or allowance from the purchase-money in respect to the lease to Mary Griffith, or else the payment by Jenkins of a sum of money equivalent to the diminution in value, and the investment of such allowance or diminution for the benefit of the plaintiff. The bill also prayed, that the 1,500*l.*, the balance of the purchase-money under the contracts might be paid by the administratrix out of the personal estate.

The principal points made in the cause, and which were raised by the answers of the administrators and the next of kin, were—first, that the contract having been for the purchase of an estate in possession, free from incumbrances, the purchaser could not have been compelled to take a reversionary estate with a compensation. And secondly, that the heir was not entitled to the performance of a contract, which his ancestor would not have been compelled to perform.†

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Mr. Monro, for the plaintiff :

Whether the purchaser could or could not have been compelled to perform the contract, and take a compensation, he might have insisted on the performance of the contract without a compensation ; and if he could do so, his heir has the same right. * * *

† Other points were raised, which judgment of the Court did not refer to them.

Mr. Seton, for the defendants, the administrators and next of kin :

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The Court will not carry a contract into effect for the benefit of the heir, where the ancestor might himself have resisted the performance of it: *Buckmaster v. Harrop*,† *Broome v. Monck*.‡ A purchaser cannot *be compelled to perform the contract, unless he gets substantially that which he has contracted to purchase: [*Knatchbull v. Grueber*,§ *Stewart v. Alliston*.||] It is now clearly settled, that a purchaser cannot be compelled to take compensation where he cannot have, substantially, the subject of his purchase. In the present case, the contract was for an estate in possession, which the purchaser could not have, in consequence of the estate for life of Mary Griffiths.

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The Lord Chief Baron, Lord LYNDEHURST, expressed his opinion, that several of the cases had carried the subject of compensation further than at the present time it would probably be carried; and that the bill, in the present instance, endeavoured to carry it still further than any of the former cases—

And his Lordship dismissed the bill with costs.

WOOD v. WESTALL.

(Younge, 305.)

1831.
May 26.

[305]

It is competent to a creditor filing a bill on behalf of himself and all other the creditors of a testator, to compromise the suit and dismiss the bill; and in such a case a fund brought into Court by the executors will, with the consent of the executors, be paid to the plaintiffs.

BILL by certain creditors on behalf of themselves and all other the creditors of a testator, for the usual accounts and payment of the debts in a course of administration.

The executors put in an answer submitting to account, and paid a balance in their hands into Court.

† 6 R. R. 132 (7 Ves. 341; 13 Ves. 456).

‡ 8 R. R. 48 (10 Ves. 597).

§ 17 R. R. 35 (1 Madd. 153; 3 Mer. 124).

|| 15 R. R. 81 (1 Mer. 26).

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Mr. Wilbraham now moved, on the part of the plaintiff, that the plaintiff's bill might be dismissed without costs, and that the money paid into Court by the defendants might be paid to the plaintiffs, they accepting the same in full for their demand against the testator's estate. In support of the application, were cited *Handford v. Storie*,† and *Maltby v. Russell*.‡

Mr. Duckworth, for the defendants (the executors), consented; but submitted to the Court, whether a bill filed on behalf of creditors could be dismissed without the Court being satisfied that the plaintiffs were the only creditors.

The LORD CHIEF BARON took time to consider the point, and, on a subsequent day, made the order as prayed, observing, that it appeared by the cases cited, that a bill filed on behalf of creditors could be dismissed by consent before decree; and as in those cases the money was ordered to be paid back to the executors, there could be no objection to the money being paid to the plaintiffs in discharge of their debts, the executors appearing by counsel, and consenting.

† 2 S. & St. 196, where LEACH, V.-C., said (p. 198), "A plaintiff who sues on behalf of himself and all other persons of the same class as he, acts upon his own mere motion and at his own expense retains the absolute dominion of the suit until

decree, and may dismiss the bill at his pleasure. After a decree he cannot by his conduct deprive other persons of the same class of the benefit of the decree if they think fit to prosecute it."—O. A. S.

‡ 25 R. R. 191 (2 S. & St. 227).

SOUTHALL *v.* ———.

(Younge, 308—317.)

1831.
April 25.

[308]

Protection from discovery claimed by the patron and rector of a benefice, on the ground that the disclosure required might expose the defendants to a charge of simony, which, if established, would subject them to forfeiture.

[A BILL was filed by an ecclesiastical rector against an occupier for an account of tithes; the occupier, by his answer, not only insisted on a *modus*, but alleged that the rector was *simoniacally* presented, and stated certain facts as evidence thereof. The occupier afterwards filed his cross bill in this suit against the rector, the patron and the Bishop of the Diocese, to establish the *modus*, and for a discovery of various matters with reference to the purchase of the advowson by the patron, who was the rector's father. The cross bill charged that in the year 1816 the advowson was purchased of the preceding incumbent in the name of the patron, and that at or about the same time all the tithes, *moduses*, and compositions arising and accruing within the rectory, were demised by the preceding incumbent to the defendant, (the patron), for the life of the said incumbent, if he should so long continue rector. That the defendant, (the rector), about the same time became the curate of the preceding incumbent, and continued to be such curate until January, 1821, when the incumbent resigned, and the defendant thereupon became rector. The bill further charged, that, on the occasion of the sale and grant of the rectory, tithes, and premises, and on various subsequent occasions, particulars and valuations in writing had been made of the tithes by the agent employed by the patron and rector in which the existence of the alleged *modus* was recognised. The bill then stated, in detail, several of such valuations, in which, as the plaintiff alleged, the *modus* was contained. The bill then charged various matters, as showing the exclusive payment and receipt of the *modus*, and prayed in the usual form the establishment of the *modus*.

The defendant, the rector, in answering the statements of the bill, confined himself to the time of his own incumbency (commencing in 1821), and demurred to so much of the bill as sought discovery of the matters which might have any tendency to prove him guilty of simony.

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The demurrer was overruled on the ground that it covered some facts which might have been safely answered.

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The bill was amended by striking out parts of the statements relating to the alleged simoniacal acts, but it remained in substance the same.

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The defendant, the rector, by his answer to the amended bill, declined to answer the questions to which his previous demurrer had applied, and stated, that the matters charged by the occupier's bill, to which he objected to make answer, would, if confessed, furnish evidence, or lead to evidence in support of the charge of simony, or would aid the proof of the charge, and would subject the defendant to forfeiture and penalties.]

Ninety-five exceptions for insufficiency were taken to the answer, which were now argued.

May 7.

Mr. Temple and *Mr. Girdlestone*, jun., in support of the exceptions.

Mr. Boteler and *Mr. Harwood*, for the defendant, the rector.

In support of the exceptions, it was urged that the defendant was bound to plead or demur to the matters as to which he sought to protect himself from a discovery.

For the defendant, it was contended that the defendant was not bound to answer charges in the bill which, if admitted to be true, would subject him to a forfeiture of his living, and to the other penalties imposed by the Act of Parliament,[†] and that he was not bound to answer any charge in the bill having a tendency to that effect. And that the plaintiff was not entitled to a discovery of the matters, as they were wholly immaterial to the merits of his case. For the defendant were cited *Macallum v. Turton, Bart.*,[‡] *Parkhurst v. Lowten*,[§] and *Agar v. The Regent's Canal Company*.^{||}

In the argument of these exceptions, the question, whether the patron, as the owner of the advowson, could protect himself from answering the same questions, was also discussed.

[†] 31 Eliz. c. 6.

[‡] 2 Younge & J. 183.

[§] 15 R. R. 140 (1 Mer. 391).

^{||} G. Coop. 221 ; see 14 R. R. 217.

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On the part of the plaintiff, it was contended, that he *could not so protect himself, the time during which the penalties imposed by the Act on the patron were recoverable having expired, and the patron, during the life of the incumbent, having no interest in the living.

For the defendant it was insisted, that the patron was still liable to be punished by the ecclesiastical law, and that his interest might be affected by the presentation by the Crown of a younger life to the living than the present incumbent.

LORD LYNDEHURST :

This case was heard on exceptions to the answer. The defendant, by his answer, objected to answer certain interrogatories in the bill. The ground of the objection was of this nature : A bill for tithes had been filed against the plaintiff by the defendant, the rector ; and, in the present plaintiff's answer to that bill, he had objected to the title of the rector to the tithes, on the ground of a simoniacal contract between him and other parties. As evidence of that contract, the present plaintiff, by his answer to that bill, stated, that the patron, either on his own account, or on account of his son, the rector, had purchased the advowson, and contemporaneously taken a lease of the tithes during the life of the then rector : that the defendant, the rector, was, about the same time, appointed to the curacy ; that the then rector immediately afterwards left the rectory, and never afterwards interfered therewith or therein ; that the defendant, the rector, continued in possession ostensibly as curate for about five years, when, in 1821, the then rector resigned, and the defendant was presented to the rectory by the defendant, the patron, as the legal owner of the advowson. Undoubtedly, if such a case as this were to be proved, it would tend to shew a simoniacal contract between these parties. It would be impossible, on this state of facts, to come to any other conclusion than that there was a simoniacal contract between them, and that the lease was granted *with a view of putting the defendant, the rector, into possession of the tithes, in order that, at a convenient time afterwards, he might be presented to the rectory.

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r.
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It is clear, that so far as concerns the rector, he would not be bound to answer these facts, as he would be subject to the forfeitures and penalties prescribed by the statute. But it has been said in argument, that, as to the defendant, the patron, he being only the owner of the advowson, the time limited by the statute for the recovery of the penalties inflicted by the Act has passed; and that his interest cannot in any manner be affected, and that he, therefore, cannot protect himself from answering. It is true, that the time limited by the Act in which pecuniary penalties could be recovered, has long since passed, and if it turned on this only, it would not form a ground of objection. But, without advertg to simony being an offence, not merely under the statute, but by the common law, as well as the ecclesiastical law, it is sufficient for me to say, that, in my judgment, the case comes precisely within the principle laid down in *Parkhurst v. Lowten*.† In that case *Mr. Lowten* insisted by demurrer, that he was not bound to answer certain parts of the bill which sought to charge him with a simoniacal contract—it was said, in the argument in that case, that he was only a trustee; and that, if the simony were established, he had no interest in the matter; that the only possible interest was, that the Crown might present a younger life to the prejudice of the next presentation. Lord ELDON, who took time to consider of the case, in the result, held, that he was not bound to answer in respect of this contract. I am of opinion that this comes precisely within the principle of *Parkhurst v. Lowten*, and that the patron is not bound to answer any questions tending to charge him with simony.

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The next question is, to what extent is he protected from answering? And I take it to be clear, that he is not only not bound to answer any question which has a direct *tendency to establish the contract, but that he is not bound to answer any question the answer to which may form a link in the chain.

I have looked through the exceptions, and the whole of them seem to me to have a tendency to this effect. I think, therefore, the exceptions must be

Over-ruled.

† 15 R. R. 140 (1 Mer. 391).

BREALEY v. COLLINS.

(Younge, 317—330.)

1831.
July 10.

[317]

On a sale by auction of a life-interest in certain funds, the life was described in the particulars of sale to be that of a very healthy gentleman, aged forty-eight. In a subsequent part of the particulars, the life was described as that of a healthy gentleman, aged forty-eight, whose life was insurable. At the sale, an insurance was guaranteed at five guineas per cent. On a bill by the vendors for a specific performance of the contract, it was proved, that, shortly before the sale, the vendors had insured the life at a premium of 4*l.* 17*s.* 10*d.* per cent., though, according to the evidence of the actuary of the office where the life was so insured, the highest rate per cent. charged in London for a healthy life of that age was 4*l.* 6*s.* Held, that, with the knowledge of this fact, the vendors were not justified in describing the life as a healthy life, and that the guaranty did not do away with the effect of this description, though the purchaser admitted he knew five guineas to be more than the premium usually charged. And the bill was dismissed with costs.

RICHARD WELFORD being entitled under the will of Robert Griffiths to the dividends of 5,805*l.* 7*s.* 1*d.*, 3*l.* per cent. Consolidated Bank Annuities for his life, he, by an indenture dated 19th May, 1828, assigned his interest to the plaintiffs in trust for sale by public auction or private contract, and to apply the purchase-money upon the trusts therein mentioned.

On the 20th November, 1828, the plaintiffs, in pursuance of the trusts of the indenture above referred to, caused the life-interest of Richard Welford in the 5,805*l.* 7*s.* 1*d.* Consols to be put up to sale by auction, with other property, in six lots, of which the life-interest formed the sixth lot. In the printed particulars of this sale, the life-interest was described as "the valuable life-interest of a very healthy gentleman, aged forty-eight." In other parts of the particulars, referring to the life-interest of Richard *Welford in other property, he was described as "a healthy gentleman, aged forty-eight years, whose life is insurable." At the time of the sale, some discussion arose whether the life of Richard Welford was an insurable life, some of the persons present stating that he was very subject to the gout, which was admitted by the auctioneer, who, however, stated that his life was insurable, and that an insurance had in fact been effected on his life at the Promoter office, within the year preceding, at 4*l.* 17*s.* 10*d.* per cent. After consulting with the solicitor attending the sale on behalf of the vendors, the auctioneer

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stated, that the insurance would be guaranteed at five guineas per cent., [and] the auctioneer's clerk, by his direction, wrote a memorandum under lot six in these words: "The insurance to be guaranteed at five guineas per cent. *An allowance is not to be required by the vendors in case it be effected for less.*† The deposit to be returned in case the gentleman should die previous *to the policy being effected before the 22nd January, 1829." By the particulars, the purchase was to be completed on or before the 22nd January, 1829. The defendant became the purchaser at the sale of the life-interest for 1,560*l.* And he paid a deposit of 20*l.* per cent., and a moiety of the auction-duty, and signed an agreement for the remainder of the purchase-money.

On the 28th November, 1828, the abstract was delivered, but which, being imperfect, was returned on the following day. On the 19th December, an amended abstract was received by the defendant's solicitor, and the deeds were examined with the abstract on the 27th December.

On the 12th January, 1829, the draft of an assignment of the life-interest was sent by the solicitors of the defendant to the plaintiffs' solicitors, with a letter, requesting them to make an appointment for Mr. Welford's appearing at the insurance office, observing, that the defendant proposed to make the insurance at the Equitable Assurance Office.

The draft was returned on the 17th January, with some alterations, which not being acceded to on the part of the defendant, the draft was on the same day sent back to the vendors' solicitors, and at the same time, the printed form of a proposal for a life-insurance by the Equitable Assurance Office was forwarded by the solicitors of the defendant to the plaintiffs' solicitors, for the purpose of being filled up with the necessary particulars. On

† The words in italics were contained in the particulars delivered to the defendant after the sale, and were proved to be in the handwriting of the auctioneer's clerk. Some mistake, however, seemed to have occurred on this subject, the auctioneer's clerk, in his examination for the plaintiffs, proving a particular

with the additional stipulation as to the guarantee, but without these words. The original bill, in stating the particulars with reference to the guarantee, contained these words: "And should it exceed that sum, an allowance should be made." The bill was subsequently amended by striking out these words.

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the 2nd February, and again on the 9th, 1829, the solicitors of the defendant wrote to the plaintiffs' solicitors, reminding them that a certificate of the baptism of Richard Welford had not been sent to them, and that the defendant's money was lying unproductive.

On the 2nd March, the certificate was received, but the proposal was not returned, and it appearing to have been mislaid, another form was procured, and sent to the plaintiffs; and, on the 13th, the proposal was returned with the blanks filled up.

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On the 14th March, the defendant's solicitors wrote a letter to the plaintiffs' solicitors, in which, after some alterations in the draft assignment, and referring to the insurance, he stated, that it would be attended with less expense if Mr. Welford would appear in London; that the Equitable was the office in which it was proposed to insure, and the day for attendance of the parties at the office was Wednesday in each week, between the hours of 11 and 1; and offering, if Mr. Welford could attend on the then next Wednesday, to pay his travelling and other expenses.

On the 25th March, Mr. Welford attended at the Equitable Assurance Office, and, in compliance with the forms of that office, filled up a form of proposal; and he, on the same day, attended before the directors, and was examined.

On the 2nd April (being the earliest day at which the determination of the company could by the rules of the office be made known), the directors stated that they declined effecting such insurance.

On the same day, the defendant's solicitors apprized the solicitors of the plaintiffs of the refusal by the Equitable Assurance Office to effect the said insurance, and informed them of the defendant's intention to abandon the contract.

On the 7th of April, the plaintiffs' solicitors required that the proposal for the insurance should be made to some other office; and accordingly, on the 9th of the same month, a printed proposal for an insurance by the Guardian office was filled up, and, with the concurrence of the plaintiffs' solicitors, submitted to the Guardian Assurance Office. The determination of the Guardian office was not made known until the 25th of April, when they also declined the assurance. This determination was communi-

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cated to the solicitors of the plaintiffs; and, on the 12th May, 1829, the defendant's solicitors wrote to them a *letter, calling on the vendors to name an office of respectability in which the insurance might be effected. To this no answer was returned; but, on the 18th of the same month of May, the defendant's solicitors were informed by the solicitors of the plaintiffs, that Richard Welford had, since the proposals were made, had an attack of paralysis, from which he was then slowly recovering.

On the 11th May, 1829, the plaintiffs filed their bill for a specific performance, by which (among other things) they charged, * * that the life of Richard Welford might, at many assurance offices in London and Westminster, have been assured at the time of sale, or at any time before the month of April, 1829, at less than 5*l.* 5*s.* per cent.; and that after the sale, and on the 1st December, 1828, a purchaser at the sale insured the life at the Promoter office at the rate of 4*l.* 17*s.* 10*d.* per cent.; and that Richard Welford, except slight attacks of gout, up to the month of April, 1829, was in apparently good health. * * *

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The defendant, by his answer, admitted that he knew that 5*l.* 5*s.* per cent. was above the rate ordinarily charged for the insurance of a life aged forty-eight years, but denied that he knew or believed that the fixing that price was intended as a notice to the parties present, that the life to be assured was otherwise than a healthy and unexceptionable life, the defendant conceiving it to be merely a means of enabling the bidders to make their calculations with some degree of certainty. * * *

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Mr. Simpkinson and Mr. Hayter, for the plaintiffs. * * *

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Mr. Beames, and Mr. W. A. Collins, for the defendant:

The plaintiffs' remedy, if any, is at law. To entitle them to a specific performance, the contract ought to be distinct in its terms, and the conduct of the plaintiffs correct. Richard Welford is described in the particulars as a very healthy, and again as a healthy gentleman. It is notorious that, in many of the offices, they will not insure the life of a person who has had the gout; and it is clear, from the evidence of the plaintiff, that Richard Welford was subject to the gout. According to the

evidence of the actuary of the Promoter office, the highest premium at any office in London for the insurance of a healthy life is 4*l.* 6*s.* 6*d.*, and yet that office would not insure the life for less than 4*l.* 17*s.* 10*d.* The plaintiffs must, therefore, unquestionably have known that Richard Welford was not a healthy man, and the statement in the particulars of sale was consequently a misrepresentation. The plaintiffs, not coming with clean hands, are not entitled to the aid of a court of equity. According to the evidence of Robins, a very important term of the guarantie was omitted in the memorandum, and the contract of which the plaintiffs seek the performance is not the contract actually entered into. The cases cited on the part of the defendant were, *Clermont v. Tasburgh*,† *Winch v. Winchester*,‡ *Higginson v. Clowes*.§

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Mr. Simpinkson, in reply [cited *Trower v. Newcombe*,|| *Fenton v. Browne*.¶] The guarantie is wholly inconsistent with the life being a healthy life.

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LORD LYNTHURST, C. B. :

The principles by which courts of equity are governed in decreeing a specific performance are wholly different from those acted upon by courts of law in actions for damages for breach of the contract. It does not follow, therefore, that if I dismiss this bill the plaintiffs may not proceed at law for damages. From the nature of this case, the plaintiffs would have nearly the same advantage by proceeding at law as they would in equity. It is a principle in equity, that the Court must see its way very clearly before it will decree a specific performance, and that it must be satisfied as to the integrity and good faith of the parties seeking its special interference.

With respect to the contract. The sale was a sale by auction of a life-interest. Two particulars of sale have been produced, in each of which the person whose life-interest is proposed to be sold, is, in the first instance, stated to be a very healthy

† 20 R. R. 243 (1 J. & W. 112).

‡ 12 R. R. 238 (1 V. & B. 375).

§ 10 R. R. 112 (15 Ves. 516).

|| 17 R. R. 171 (3 Mer. 704).

¶ 9 R. R. 255 (14 Ves. 144).

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gentleman of the age of forty-eight years. In a subsequent description, in the same *particulars of sale, the word "very" is omitted, and the interest is described to be that of the life "of a healthy gentleman, aged forty-eight, whose life is insurable." The former description is less qualified than the latter; and I should perhaps be justified in holding, in this case, the parties seeking the specific performance bound by the strongest description, and that, as to them, the life ought to be treated as the life of a *very* healthy gentleman. I do not know that it is necessary for the present purpose to rest the case on this, but to take it as if the description had been simply the life of a healthy gentleman. It has been said, that this description was waived or altered by a further contract; and evidence has been entered into respecting the conversation which passed at the time of the sale. This I must leave out of the question, for the defendant has positively sworn that he did not hear it.

It has been argued, and with some plausibility, that the description in the particulars is cut down and superseded by the guarantie.

The defendant says he knew that five guineas per cent. was more than the rate ordinarily charged for the insurance of a life aged forty-eight, but he does not say how much more; and this is coupled with a statement, that he did not know or believe that the fixing that price was intended as notice that the life was otherwise than a healthy and unexceptionable life, the defendant considering it to be only a means of enabling the bidders to make their calculations. I think this is the fair conclusion to be drawn from the facts, and that it was a general guarantie to the extent of five guineas, but the insurance might be more or it might be less. I think in fairness it amounts to nothing more, and does not do away with the description in the particulars of the life being that of a healthy gentleman.

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Mr. Welford, according to the evidence of the medical men, appears undoubtedly to have been in good health, but to have had the gout; and, on one occasion, a slight *attack of rheumatism. If the case had rested here, I should perhaps have thought this sufficient, and that Richard Welford's life was proved to be a healthy life, within the description; but the plaintiffs themselves produced

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other evidence. They proved two insurances effected on the life of Welford about the time of the sale, and we have it in evidence, from the actuary examined by them, that those insurances were effected at a premium of 4*l.* 17*s.* 10*d.* per cent.; whilst it is proved by the same actuary, that the highest rate charged at any office in London, on a healthy life of the same age, was 4*l.* 6*s.* per cent.

I think, therefore, that when the parties stated the life to be a healthy life, they stated that which was not the fact; and that, knowing they had not been able to effect an insurance on the life at less than 12*s.* 6*d.* per cent. above the highest rate of insurance on a healthy life of the same age, they were bound to state it, and were not justified in stating the life to be a healthy life. It has been urged, that the contract has not been performed through the default of the defendant, and that the defendant might have thought fit to become his own insurer; but still, he would be entitled to have a healthy life, within the terms of the contract.

It appears to me, that the defendant took all necessary steps for effecting the insurance, but could not effect it at the offices to which he applied. It is true, that there was no application to insure at the Promoter office, but the defendant was not bound to insure there; he might prefer any other office in which he had more confidence. Before he had gone the round of the offices, Welford had a paralytic stroke, and his life then became uninsurable. It is, however, unnecessary to consider whether any of the offices would or would not have insured the life, for the defendant was not bound to insure, but might have elected to take the risk on himself, and become his own insurer.

I think, upon the whole of the circumstances, I should not be justified in decreeing a specific performance; and I feel the less reluctance in refusing it, because the plaintiffs can, if they think fit, go to a court of law, where they will obtain damages if they succeed in making out their case. In fact, the bill, in this suit, merely seeks a pecuniary payment in the shape of a specific performance.

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I think the bill must be

Dismissed, with costs.

1830.
Nov. 10.
1831.
May 31.

REYNOLDS *v.* WARING.

(Younge, 346—353.)

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Specific performance of a parol agreement for the sale of an estate, proved by one witness, confirmed by part performance, by taking possession, and acts of ownership, refused; there being some inconsistencies in the testimony of the witness, which, with other circumstances, placed the terms of the contract in doubt.

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THE bill, which was filed by Owen Reynolds and Henry Potts, as the surviving devisees in trust of William Edwards, deceased, against John Waring, as the heir-at-law, and John Williams and Elizabeth, his wife, as the personal representative of William Waring, deceased, stated, that, in 1823, William Waring offered to Henry Rumsey Williams, the attorney and authorized agent of the plaintiffs and their co-trustee, David Jones, deceased, to become the purchaser of a certain field and tenement called *Cilguilydfaur, of which the plaintiffs and David Jones were seised, in trust for sale, at the price or sum of 900*l.*, and to take the timber and other trees growing thereon at the valuation which had been previously made thereof by the trustees; and Williams having communicated that offer to the plaintiffs and their co-trustee, Jones, he was directed by them to accept such offer; and he accordingly wrote a letter to William Waring to the following effect: "DEAR SIR,—I have just heard from Mr. Reynolds respecting Cilguilydfaur, and he consents to your having it for 900*l.* as offered by you. Yours, &c., H. R. WILLIAMS. Penbros, 18th March, 1823." That such letter was received by William Waring, who, on or about the 24th March, 1823, directed the said David Jones to inform Williams that he would abide by his offer; and Jones accordingly addressed a letter to Williams to the following effect: "Mr. Waring has taken Cilguilydfaur for 900*l.*" That a short time afterwards William Waring, being desirous to purchase certain other parts of the said estates, called the Tyddyn Fields, he, on the 29th April, 1823, addressed a letter to Williams, by which he offered to purchase the Tyddyn Fields for 1,000*l.*; and, after some treaty and correspondence, it was finally agreed by and between William Waring and the plaintiffs, and their co-trustee, Jones, that William Waring should become the purchaser of

the Tyddyn Fields for 1,050*l.*, exclusive of the timber growing thereon, which was to be taken at a valuation thereof previously made; and a memorandum thereof was, at the request of William Waring, entered by the plaintiff, Reynolds, in his book; and William Waring at the same time made a memorandum in his own hand-writing, in his pocket book, in the following words: "Bought the Tyddyn Fields of Mr. Reynolds for one thousand guineas." That the timber and trees on Cilguilydfaur and the Tyddyn Fields had, previously to the contracts, been valued at 120*l.* 7*s.* 9*d.*; and that, in pursuance of the contracts, *William Waring, on the 30th November, 1823, entered into possession of the premises, and he marked and numbered the timber and other trees, for the purpose of felling the same; and he directed Henry Rumsey Williams, as his attorney, to prepare a conveyance to him of the said premises; and in compliance with such direction the draft of a conveyance was prepared by Williams. That Wm. Waring continued in possession to the time of his death, on the 24th September, 1824, but never paid any part of his purchase money, nor was any conveyance executed to him. The bill prayed a specific performance of the contracts, and payment of the purchase monies, with interest.

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WARING.

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The defendant, the heir-at-law, submitted to have the contracts performed.

The defendants, the administratrix of William Waring and her husband, denied all knowledge of the contracts stated in the bill, and expressed their belief, from the information they had received, that William Waring was in possession of the lands as tenant thereof from year to year. They admitted the finding the pocket book with the memorandum in it to the effect stated in the bill; but they expressed their entire ignorance of the letters and other matters stated in the bill.

The plaintiffs proved, by the evidence of Henry Rumsey Williams, that, in February or March, 1823, William Waring offered to him to become the purchaser of Cilguilydfaur for the sum of 900*l.*, and to take the timber and other trees growing thereon at a valuation, which had been previously made thereof. They also proved by the same witness the acceptance of the offer by the plaintiffs and the writing of the letter of the 18th March,

REYNOLDS 1823, and an acknowledgment by William Waring that he had
 r.
 WARING. received such letter; the parol agreement entered into on the
 28th May, 1823, by which the plaintiffs and David Jones agreed
 [*349] to sell to William Waring, who agreed to *purchase, the Tyddyn
 Fields for 1,050*l.*, exclusive of the timber and other trees growing
 thereon, which was agreed by Waring to be taken at the valuation
 thereof previously made. That William Waring, on the 30th
 November, 1823, and (as the witness believed) in pursuance of
 the contracts, entered into possession; and he continued in such
 possession until his death in September, 1824. That during the
 time William Waring was in possession, he informed the witness
 that he had directed the timber and other trees growing on the
 Tyddyn Fields to be marked and numbered, which had accordingly
 been marked and numbered, there being no timber growing on
 the said lands and hereditaments called Cilguilydfaur. The
 witness also proved his employment by William Waring to
 prepare the conveyance. The plaintiffs also proved by another
 witness the valuation of the timber on the Tyddyn Fields, the
 taking possession of both estates by William Waring for six or
 twelve months before his death, and the marking and numbering
 of trees in the Tyddyn Fields under his direction during his
 possession. They also proved that William Waring had let the
 Tyddyn Fields to a tenant.

Mr. Roupell and Mr. Cockerell, for the plaintiffs:

The contracts are clearly made out by the evidence of Henry
 Rumsey Williams, and his evidence, corroborated by the circum-
 stances, will entitle the plaintiffs to a decree. The existence of
 the contracts is also made out by the possession taken by William
 Waring, and the acts of ownership exercised by him, which could
 only be done with reference to his character as a purchaser, and
 not as a tenant. The possession taken by William Waring, and
 the acts done by him, were such as to exclude the operation of
 the Statute of Frauds. The parol evidence supplies any defect
 in the terms of the contracts; and it is clear that the terms of
 an agreement partly performed may be proved partly *by writing
 and partly by parol testimony: *Morphett v. Jones.*†

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† 18 R. R. 48 (1 Swanst. 172).

Mr. Temple, for the defendant, the heir-at-law.

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Mr. Treslove and *Mr. Jemmett*, for the other defendants :

There is no sufficient written contract within the Statute of Frauds. Admitting that a specific performance will be decreed of a parol agreement, where there have been acts of part performance, still those acts must be unequivocal, and the terms of the contract must be distinctly made out in evidence. The possession by William Waring was merely as tenant. The evidence respecting the contracts cannot be relied on, the contract, as stated by Williams, being different from that stated in the memorandum: the timber being to be taken at a valuation according to Williams' evidence, whilst no mention of timber is made in the memorandum. That Mr. Williams may be mistaken, may be assumed from the different statements in his depositions respecting the timber, and from his also stating William Waring to have remained in possession to September, 1824, when he in fact died in December, 1823.

ALEXANDER, C. B. :

Nov. 10.

Several of the most learned and able Judges have regretted the departure which has taken place from the Statute of Frauds, as tending to render nugatory a most beneficial enactment, and to promote, rather than lessen, those evils which it was the object of the Legislature to prevent.

The cases in which the statute has been departed from are, however, now too well established to be disregarded; and I can only express my entire concurrence with those who have declared that the cases ought not to be carried a step farther.

I do not in the least doubt that a clear part performance of a contract entitles the party in equity to a specific performance. I think it is also clear, that putting the vendee into possession of the estate contracted to be sold, is such a part performance. This case, however, will turn on the application of other principles, and especially those by which, in later times, it has been considered as absolutely necessary that a party seeking the specific performance of a contract, on the ground of a part performance, should be prepared to shew the distinct terms and nature of the contract,

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and that possession was given, and that it was given in pursuance of that contract.

In this case there is nothing but the evidence of Mr. Williams to shew what those terms were, except the memorandum in the vendee's pocket book. That memorandum differs totally from the evidence of Mr. Williams. The memorandum states the price as one thousand guineas; whilst, according to Mr. Williams, it was to be one thousand guineas, and the valuation of the timber ultra. This certainly shews that there was some agreement, but an agreement different from that proved in the cause.

I apprehend it to have been decided by some of the ablest Judges, that they will not decree a specific performance of an agreement with a variation in its terms. I have no doubt, in this case, that the party took possession under the contract. It is clear, from the evidence, that possession was taken after the contract. But I think I cannot make any decree, the agreement being too uncertain in its terms to be specifically performed.

[*352] As to the Tyddyn farm, I must consider the memorandum, which comes out of the hands of Waring, as containing the correct terms of the agreement; and, taking this to be so, it shews, at the least, a great deal of confusion in the testimony of Mr. Williams. It would be too much to decree a specific performance on the testimony of a single *witness, who clearly appears to be in some respects inaccurate in his statements.

Bill dismissed, without costs.

1831.
May 31.

The plaintiffs presented a petition of rehearing. The cause was reheard.

LORD LYNDEHURST, C. B. :

This is a bill for a specific performance of two contracts for the sale of certain land. The cause came on to be heard originally before Sir Wm. Alexander, who dismissed the bill, and it now comes before me on a rehearing.

There were two contracts for the sale of two distinct parcels of land. Parol evidence was given for the purpose of shewing a part performance of the contracts. The vendee had been allowed to take possession, and had occupied till his death. If proved,

there can be no doubt that, though the contract was by parol, the Court would decree a specific performance. The question therefore is, whether, in point of evidence, the Court is satisfied of the existence and terms of the contract, and the evidence of part performance of it. Now, with respect to the evidence of the contracts, one contract related to an estate called the Tyddyn Fields. The evidence as to this depends on the testimony of Williams. He states in precise terms that he was present, and that the parties agreed on the terms, which were, that William Waring should purchase that estate at 1,050*l.*, exclusive of the timber and other trees, which were to be taken by Waring according to a valuation previously made.

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According to the parol evidence of Williams, therefore, one thousand guineas was to be paid for the Tyddyn Fields, exclusive of the timber. But, in the memorandum in William Waring's pocket book, the price is stated to be one thousand guineas only, without any reference to the timber. *There is, consequently, a variation between the evidence of Mr. Williams and the memorandum, and with such a variation it is quite impossible for the Court to decree a specific performance.

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As to the other piece of land, the contract rests chiefly on the evidence of Mr. Williams. The correspondence omits to notice that part of the alleged stipulation as to the valuation of the timber on this piece of land. This is attempted to be explained by the fact of there being no timber; and it is proved by Williams that there is no timber. It is rather extraordinary that the vendee, living on the spot, and knowing that there could be no timber, should offer to give 900*l.*, and to purchase the timber at a valuation, if there were no timber upon it. It is open to this explanation, that it might mean timber and other trees. But Williams does not state whether there were any other trees, which might have been the subject of valuation. William Waring died in December, 1823; and it is clear that he had been in possession for some months. Mr. Williams is, therefore, inaccurate, when he states that he entered into possession on the 30th November, 1823, and continued in possession until his death in September, 1824. I mention this, to shew that no great reliance can be placed on the testimony of Mr. Williams; and,

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therefore, although the Court will unquestionably decree a specific performance of a parol contract, if the terms of that contract be distinctly made out, and there be clear evidence that possession was taken under it; yet, in the present case, it appears to me that there is so great a variance in the contracts, according to the parol testimony and the memorandum produced, that a specific performance ought not to be decreed. I proceed entirely on this ground, and which seems to have been the basis of the decision of the late Chief Baron. This renders it unnecessary for me to go into that part of the evidence as to the possession.

I think the bill must be

Dismissed, with costs.

1831.
July 4.

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FRASER v. PIGOTT.†

(Younge, 354—357.)

A. by his will bequeathed a sum of stock in certain events to his grandchildren, being children of his sons, William and John, whether born in wedlock or not. And, after certain specific bequests, he gave the residue of his personal estate to his sons, William and John, as tenants in common; but if either of them should die in his (the testator's) life-time, the moiety of the deceased son should go to his children; but if both his sons should die in his life-time, then he gave the residue to and among all their children, as tenants in common. The testator's two sons died in his life-time, one leaving legitimate and illegitimate children, the other illegitimate children only: Held, that the legitimate children of the son having both descriptions of children, and the illegitimate children of the other son took the residue, and that the illegitimate children of the first-mentioned son took no interest.

JOHN FRASER, by his will, dated 2nd September, 1822, bequeathed to the defendant, Jane Janet Pigott, the interest and dividends of 2,200*l.* Bank New 4*l.* per cent. Annuities for her life, for her separate use; and after her decease he gave the principal stock to and among all her children living at her death, share and share alike, or to an only child, if there should be but one then living; but if no such child, then he gave the said Bank Annuities to and among such of his (the testator's)

† This case was questioned and dissented from by STUART, V.-C. on more than one occasion; see *In re Overhill's Trusts* (1853) 1 Sm. & G. 362; 22 L. J. Ch. 485; *Holt v.*

Sindrey (1868) L. R. 7 Eq. 170, 174; 38 L. J. Ch. 126; *Crook v. Hill* (1869) L. R. 6 Ch. 311; 40 L. J. Ch. 216, affirmed in H. L., L. R. 6 H. L. 265; 42 L. J. Ch. 702.—O. A. S.

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grandchildren, being children of his late sons William and John, whether born in wedlock or not, as the said Jane Janet Pigott should by deed or will direct or appoint; and, for want of such appointment, to the defendants, William Fraser and Isabella Fraser, children of his late son William Fraser, and the plaintiffs, William Fraser, Katherine Fraser, and Elizabeth Hyde, then Elizabeth Fraser, the children of his late son John Fraser, equally, as tenants in common, share and share alike, on their respectively attaining the age of twenty-one years. Also, he gave and bequeathed to his grandson the plaintiff, William Fraser, the net produce arising from the sale of his, the testator's, chambers in Gray's Inn; and he gave to the defendant, Jane Janet Pigott, his leasehold house in Arlington Street; and he *gave to the said William Fraser, son of his late son William Fraser, 300*l.*, and, to Isabella and Ann, the daughters of his said late son William, 250*l.*, the boy, on his attaining twenty-one years, the girls, at that age or marriage; and he gave unto his granddaughter, Louisa Van Heythuysen, the wife of Crisp Van Heythuysen, 200*l.*; and to each of her sisters, the plaintiffs, 300*l.*; and to their brother 400*l.* on his attaining twenty-one. All the rest, residue, and remainder of his estate and effects, he gave and bequeathed to his sons, William Fraser and John Fraser, equally, share and share alike; but, if either of them should die in his life-time, the moiety of his deceased son should go and belong to his children equally; but if both his sons should die in his life-time, in such case he gave and bequeathed the same to and amongst all their children, equally, as tenants in common, on attaining twenty-one years, or as to the females at that age or day of marriage. And he appointed James Bird and the said Jane Janet Pigott, executor and executrix of his will.

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The testator died in December, 1828; and his will was proved by Jane Janet Pigott alone.

The testator's two sons, John Fraser and William Fraser, died in his life-time. John Fraser, the son, left three legitimate children; the plaintiffs, William Fraser, Katherine Fraser and Elizabeth Hyde, and who, at the death of the testator, were his only next of kin. John Fraser also left two illegitimate children, the defendants Louisa Van Heythuysen and John Fraser.

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The testator's other son, William Fraser, did not leave any legitimate children, but he left three illegitimate children, the defendants, William Fraser, Isabella Fraser, and Ann Fraser.

The defendant, Jane Janet Pigott, had one child only, the defendant Mary Ann Pigott.

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The bill was filed by the legitimate children of John Fraser against Jane Janet Pigott and her husband, and *their daughter, and against the illegitimate children of William Fraser, and the two illegitimate children of John Fraser; and it prayed the usual accounts and a declaration of the rights of the parties.

The chief question raised in the pleadings and discussed at the hearing was, whether the two illegitimate children of John Fraser took any interest in the residuary estate, under the bequest contained in the testator's will.

Mr. Treslove and Mr. Roupell for the plaintiffs :

Whatever may have been the testator's intention, the policy of the law requires that by children shall be intended legitimate children only. Children, without any limitation, must mean legitimate children only. Children, under certain exceptions, may mean illegitimate children; but evidence will not be let in to shew that illegitimate children were meant where there are legitimate children to answer the description, or a possibility of legitimate children being born: *Cartwright v. Vawdry*,† *Hart v. Durand*,‡ *Godfrey v. Davis*,§ *Wilkinson v. Adam*,|| *Beachcroft v. Beachcroft*,¶ *Lord Woodhouselee v. Dalrymple*.†† In *Harris v. Lloyd*‡‡ it was held, that if there were any possibility of the party having legitimate children, illegitimate could not take; the Court could not presume that there would be illegitimate children. In this case, William Fraser had no legitimate children, and it is not disputed that his illegitimate children may take; but John Fraser had both legitimate and illegitimate, and the latter cannot take.

† 5 R. R. 108 (5 Ves. 530).

‡ 3 Anstr. 864.

§ 5 R. R. 204 (6 Ves. 43).

|| 12 R. R. 255 (1 V. & B. 422).

¶ 16 R. R. 242 (1 Madd. 430).

†† 16 R. R. 193 (2 Mer. 419).

‡‡ 24 R. R. 68 (T. & R. 310.)

Mr. Wigram and Mr. Heathfield for the defendants, Jane Janet Pigott and Mary Ann Pigott.

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Mr. Beales, for the defendants, the illegitimate children of John Fraser :

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This case is distinguishable from *Cartwright v. Vawdry*, and the other cases cited, inasmuch as the testator has clearly shewn his intention that the illegitimate as well as legitimate children should take, by having in the former part of his will given the 2,200*l.* Four per cent. Annuities in certain events to the children, legitimate or illegitimate.

LORD LYNDHURST, C. B. :

It seems to be clear, upon the cases, that, where there are any legitimate children to answer the description of children, then, according to the rule of law, the legitimate children only will take. If there be no legitimate children, then extrinsic evidence may be given of the persons who were intended ; but where there are legitimate and illegitimate children, legitimate children only will take under the description of children.

In this case the illegitimate children of William Fraser, and the legitimate children only of John Fraser, appear to me to be entitled.

SMALL v. ATTWOOD.

(Younge, 407—538.)

REVERSED on appeal to the House of Lords, as reported in 6 Cl. & F. 232, to be contained in a later volume of the Revised Reports.]

1831.
Nov. 21 and
20, subsequent
days.
1832.
Nov. 1.

1832.
May 7.

[541]

WHITBREAD v. GURNEY AND OTHERS.

(Younge, 541.)

Though a defendant in a suit is not compellable to produce letters, and copies of letters, between himself and his solicitor, subsequently to the institution of the suit, and in relation thereto, yet, where there are more defendants than one, they are bound to produce letters, and copies of letters, which have passed between them with respect to their defence of the suit.

MR. JAMES WIGRAM, and *Sir George Grey*, for the plaintiff, moved for the production of certain papers and letters admitted by the answer of one of the defendants to be in his custody or power.

Mr. Jacob and *Mr. Chandless* contended, that some of the letters having passed between the defendants and their solicitors subsequently to the institution of the suit, and in relation thereto, the plaintiffs were not entitled to the production of them. They also insisted that some other letters which had passed between the defendants themselves, with respect to the defence which they should make to the suit, were in like manner privileged from production. * * *

Lord LYNDHURST held that the former letters were privileged: but that the rule laid down in *Bolton v. The Corporation of Liverpool*,† with respect to letters between parties and their solicitors, did not apply to letters between the parties themselves.

1832.
July 3.

[562]

ATTORNEY-GENERAL v. MOLLAND.

(Younge, 562—567.)

A testatrix bequeathed the sum of 100*l.*, to be put out on good security by her executors thereinafter to be nominated, and the interest to be annually paid by her executors to A. B., of W., and his successors, so long as he the said A. B. and his successors should teach in the said town of W. the gospel of Christ, under the name of orthodoxy. The evidence shewed that A. B., in the lifetime of the testatrix, preached to a congregation in W., of calvinists, or, as they called themselves, orthodox independents: Held, that the minister for the time being of the congregation at which A. B. preached in the lifetime of the testatrix, was entitled, so long as he preached the doctrines preached by A. B. in the lifetime of the testatrix, to the interest of the legacy.

SARAH TEUXBURY, spinster, by her will, dated the 15th of February, 1803, after directing that all her just debts *and

† 1 My. & K. 88, to be reported in 36 R. R.

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funeral expenses should be paid and discharged, bequeathed to John Strickland a legacy or sum of 100*l.*, and she gave and bequeathed the sum of 100*l.*, to be put out on good security by her executors in trust thereafter to be nominated, and the interest of the said sum of 100*l.* to be annually paid by her executors to the Rev. J. Banister, of Wareham, and to his successors, so long as he the said J. Banister and his successors should teach in the said town of Wareham the gospel of Christ, under the name of orthodoxy ; and, after bequeathing the sum of 100*l.* to the Missionary Society for the spread of the Gospel among the heathens abroad, and giving and bequeathing certain other pecuniary legacies, she gave and bequeathed as follows : “ All the rest of my personal estate whatever, such as my house at East Lulworth, my household goods, my monies, bills, and securities for monies, whatsoever and wheresoever, except what I have before given, I give and bequeath to Thomas Molland, son of the Rev. Thomas Molland, of Thaxted, in the county of Essex ; and I do hereby nominate and appoint the said Thomas Molland, jun., my executor and administrator ; but, in case the said Thomas Molland, my chosen executor, should die without issue, then my will is, that my household goods shall be given, that is to say, I give it, in such case, to the aforesaid John Strickland, excepting one large chest, and one pier glass, and one brass fender, which I give to the said Mary Furber ; and, in case my said executor Thomas Molland die without issue, then, in such case, I give my money, that is to say, the interest of all my monies found in the Bank of England, to the Rev. John Banister, of Wareham, and to the Rev. B. Cracknell, of Weymouth, and their successors, the said interest to be given by them and their successors for the promulgation of the Gospel, and to be annually paid to them by my executors and assignees in trust, and by their successors to be nominated and appointed by my appointed executors in trust, J. Strickland aforesaid, bailiff to Nathaniel *Bond, of East Holme, in the county of Dorset, and the said James Furber, sen., of Staple. My will is, that my said executor, Thomas Molland, shall have power to sell out, and again buy in, my monies into the Bank of England, but not waste or diminish the same that first come to his possession. My house at East

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MOLLAND. Lulworth shall be let at a moderate rent, and be made use of as a preaching house so long as my interest shall last in it; and, in case Thomas Molland die without issue, then shall my said house devolve to the aforesaid J. Strickland."

The information and bill were filed by Foster, who succeeded Banister as minister of the congregation at Wareham, and by a member of the congregation, against Molland, as the executor of the testatrix; and it prayed that the legacy of 100*l.* might be invested, and the interest paid to Foster and his successors.

Molland, by his answer, admitted assets of the testatrix, but alleged that Strickland and Furber, the chosen executors named in the testatrix's will, had received the legacy, and that those individuals, or their personal representatives, were the persons against whom the relief sought by the information ought to have been prayed.

The effect of the evidence was, that the doctrines preached by the plaintiff Foster were the same as those preached by Banister; and, that the congregation was a congregation of dissenting Christians, who held the doctrine of the Trinity.

Mr. Jervis and Mr. Hayter, for the plaintiffs.

Mr. Simpkinson, for the defendant.

It was argued for the defendant, that the gift was too vague to be carried into effect; and, if not, yet that the legacy had been satisfied by the payment to Strickland and Furber; that there was no sufficient evidence of what was meant by the term orthodoxy, which, according to law *could only mean the established religion; and that the evidence as to the tenets preached by Banister and his successors, was contradictory.

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LORD LYNTHURST, C. B. :

It appears to me that the intention of the testatrix is manifest, and that there is sufficient evidence to entitle the person who for the time being shall be minister of the congregation mentioned in her will, to the interest of the 100*l.* The testatrix died in the year 1803, and it was manifestly her intention that the minister for the time being of that congregation, so long as he continued

to teach the same doctrines which were taught by the existing minister, Mr. Banister, should be entitled to this income. The evidence is of this description. There is a person who says he, after the year 1803, and during the whole of the life of Banister, was a member of that congregation; and that, during the whole of Banister's lifetime, while this individual was a member of the congregation, Banister continued to preach the same doctrines; and that the present minister, Foster, continues to preach the same doctrines that Banister preached during that period. Still, however, it is necessary to identify the doctrines preached by Banister during the period to which this witness refers, with the doctrines that were preached by the same individual in the lifetime of the testatrix. Now, that defect is supplied by the second witness, who swears that he was a member of the congregation during the lifetime of the testatrix; that is, previously to the year 1803, which was during the lifetime of the testatrix; that Banister was minister at that time; and, that Banister always preached the same doctrines; that Foster now preaches the same doctrines as Banister preached; and that the congregation is a congregation of calvinistic independents, or orthodox independents, as he calls them; and every sect considers its own doctrines as orthodox doctrines. It appears to me that there is sufficient to shew *clearly what the intention of the testatrix was; and there is sufficient evidence to shew that Foster is preaching the same doctrines that Banister preached. There being no contradictory evidence offered in opposition, I think there is sufficient to give effect to the will of the testatrix.

The next question is with respect to the construction of the will. In the will she appointed an executor, Molland, whom she sometimes calls executor and sometimes calls her chosen executor; but there is another class of persons named in the will whom she calls her executors in trust, and she names as those executors in trust a person of the name of Strickland and a person of the name of Furber, and she calls them her appointed executors in trust; and she speaks of the successors of those individuals as persons to be chosen and to be appointed by her appointed executors. So, that there are two classes of persons, an executor whom she names, and whom she calls her chosen

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executor, and appointed executors in trust, and the successors of such appointed executors in trust to be appointed by her appointed executors in trust. Then, in this bequest, she directs the 100*l.* to be laid out by her executors in trust hereinafter mentioned; that is, as I understand, Strickland and Furber; and she directs the interest of the 100*l.* to be paid by her executors, in the plural, evidently the same executors. Afterwards, for the purpose of throwing light on this, when you come to the bequest to Molland, in the event of Molland's dying without issue, she takes on herself to bequeath over the property—to whom? To Banister, and to another person who was minister of a congregation at Wareham; not for their own benefit, but in order that they might apply the interest of that money for the promulgation of the gospel. But she directs the interest of that money to be paid over to them in the first instance—by whom? By her executors in trust, and their successors; which executors in trust she *names immediately after that bequest: so that it is quite clear that her intention, as far as you can say any thing is clear on a will so inartificially constructed, was that her executors should pay over the money in the first instance to the executors in trust; that the money should be laid out by them according to their judgment and discretion; and that they should pay over the dividends from time to time to Banister and his successors. But then it is stated that they have allowed Strickland and Furber to retain this 100*l.*, or that which is equivalent to it: but there is no proof of that fact.

Refer it to the Master to inquire whether the defendant has paid or allowed out of the testator's estate to Strickland and Furber, or either of them, the 100*l.* mentioned in the will of the testatrix—with liberty to Strickland and Furber's representatives, or any or either of them, to attend before the Master on the inquiry.

1832.
July 3.

[599]

VINCENT *v.* NEWCOMBE.†

(Younge, 599—601; S. C. 2 L. J. (N. S.) Ex. Eq. 15.)

A testatrix by her will bequeathed funded property sufficient to pay an annuity of 50*l.* to A. for life, and, after A.'s death, she bequeathed the fund to other persons. And, after giving various pecuniary legacies,

† *Porter v. Baddeley* (1877) 5 Ch. D. 542.

she bequeathed to B. the whole of the remainder of her (the testatrix's) dividends, during her life; and, after B.'s decease, she bequeathed 1,000*l.* stock to C., and other sums of stock to other persons. The testatrix died shortly after the date of her will, entitled to 606*l.* Long Annuities, but to no other stock: Held, that the bequest to B. during her life, of the whole of the remainder of the dividends of the testatrix, was specific, and that C. and the other legatees in remainder after B.'s death, were not entitled to have the Long Annuities converted into Bank Annuities; though, being a decreasing fund, the legacies might altogether fail.

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MARY FLUDYER, by her will, dated 7th September, 1829, made the following bequests:

"I do hereby give and bequeath in trust to Mrs. Mary Newcombe, widow of the late William Newcombe, Esq., of Fleet Street, London, banker, and Edward Vincent, surgeon, of Stratford, in the parish of West Ham, in the county of Essex, funded property sufficient to pay to Sarah Bateman, spinster, of Mile End, the sum of 50*l.* per annum, to be paid half-yearly whenever the dividends become due, during her natural life; and, at her decease, I give and bequeath the said funded property to Frances Jane Vincent, daughter of Edward and Frances Jane Vincent, of Stratford, in West Ham, Essex, and to her heirs.

"I further give and bequeath to Henry Raven, of Hendon Street, Regent Street, London, the sum of 20*l.* per annum, to be paid by my aforesaid trustees from my funded property, *during his natural life, to be paid half-yearly as the dividends become due."

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The testatrix then bequeathed some pecuniary and specific legacies amounting to about 200*l.*, and a legacy of 200*l.* to her trustee Edward Vincent, and to Dr. Burford 20 guineas for her funeral service; and the will then proceeded as follows:

"I give and bequeath to my aforesaid trustee, Mrs. Mary Newcombe, the whole of the remainder of my dividends during her natural life; and, at her decease, 1,000*l.* stock I give and bequeath to the Rev. William Vincent, rector of the parish of Allhallows, London, and of———, in Sussex: and I further give and bequeath, at the death of Mrs. Newcombe, 1,000*l.* stock to George Vincent, near Westminster, in London. I further give, at Mrs. Newcombe's death, 2,000*l.* stock to the before-named Rev. Dr. Burford, of West Ham, Essex. I also give and bequeath to the Rev. Arthur Henry Glasse, at the death of Mrs. Newcombe,

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1,000*l.* stock. I also give and bequeath, at the death of Mrs. Newcombe, to my said trustee Edward Vincent, of Stratford, West Ham, Essex, 3,000*l.* stock." It then contained directions for her funeral, and mourning for her servants, and proceeded—

"I do further appoint and constitute my aforesaid trustee, Edward Vincent, surgeon, of West Ham, in the county of Essex, my residuary legatee, and his assigns. I do hereby further name and appoint my aforesaid trustees, viz. Mrs. Mary Newcombe, of Bloomsbury Square, London, and Edward Vincent, surgeon, of West Ham, my executrix and executor for carrying this my will into effect."

The testatrix died about a month after the date of her will, possessed of 606*l.* Long Annuities, and no other kind of stock. All the rest of her personal property, and a part of these Long Annuities were sold to pay the debts and legacies, and to secure a perpetual annuity of 50*l.* to Sarah Bateman, and, after her decease, to Frances Jane Vincent. And there then remained about 450*l.* of the Long Annuities.

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The bill was filed by Edward Vincent against Mary Newcombe, and the representatives of Dr. Burford, who died soon after the testatrix, for the purpose of obtaining a declaration of the rights of the parties.

Mr. Spence, for the plaintiff, contended that the residue of the Long Annuities ought to be converted into Three per cent. Bank Annuities, though it would necessarily diminish the dividends payable to Mary Newcombe; for, otherwise, the Long Annuities being a decreasing fund, the legacies and residue payable after the decease of the defendant, Mary Newcombe, might become greatly reduced, if not altogether defeated.

Mr. Sharpe, for the defendants, the representatives of Dr. Burford, argued that the whole will, and particularly the first bequest, shewed an intention on the part of the testatrix, that the property should be converted into a permanent stock, and not a determinable stock, such as the Long Annuities.

Mr. Simpkinson, for the defendant Mary Newcombe, insisted that the bequest to her was a specific bequest of the whole of the

remainder of the testatrix's dividends, during her life; and that she was entitled to have that bequest fully satisfied.

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The Lord Chief Baron (Lord LYNDEHURST), without hearing *Mr. Simpkinson's* argument to a conclusion, observed that the testatrix evidently intended the first bequest to be a perpetuity, and had expressed herself accordingly with sufficient clearness; but, in the bequest to Henry Raven, there was no such indication; and that it was impossible to get over the words, "the whole of the remainder of my dividends."

The decree declared that Mary Newcombe was entitled to the whole of the remaining Long Annuities during her life, and directed the costs of all parties to be paid out of the estate.

TEULON v. CURTIS.

(Younge, 610—620; S. C. 2 L. J. (N. S.) Exch. Eq. 17.)

1832.
Dec. 4, 5.

[610]

A. being entitled in fee to a freehold estate in remainder expectant on the decease of B., demised his interest to C. for a term of 500 years, subject to a proviso for redemption on payment of the sum of 1,000*l.* and interest, without any time being fixed by the proviso for payment of the money: the deed contained a covenant by A. for payment of the money on demand, and also a covenant that it should be lawful for C. to enter into the property, and to hold and enjoy the same until the payment of the principal money and interest: Held, that the mortgage was in the nature of a Welsh mortgage; and that a foreclosure suit could not be brought by the mortgagee.

But if the mortgagor under a Welsh mortgage obtains a decree for redemption, and fails to redeem, he will be foreclosed (see next case).

By an indenture, dated 9th August, 1814, and made between Alexander Peter Allan, of the one part, and the plaintiff, of the other part, Allan granted and demised to the plaintiff, his executors, administrators, and assigns, the remainder or reversion, and other estate or interest of him the said Allan [expectant upon the decease of Alexander Smyth, the tenant for life], of and in certain hereditaments and premises therein described, for the term of five hundred years, subject to a proviso for cesser of the said term on payment by the said Allan, his heirs, executors, or administrators, to the plaintiff, his executors, administrators, *and assigns, of the sum of 1,019*l.* 7*s.* 4*d.*, with interest thereon

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after the rate of five per cent. per annum. The deed contained a covenant on the part of Allan, for payment of the principal money, and interest for the same, on demand; and also a covenant that, until payment should be made of the principal money and interest, it should be lawful for the plaintiff to enter into and hold and enjoy the premises; and for further assurance. A receipt for the consideration, signed by Allan, was indorsed on the deed.

[The remainder or reversion of and in the said hereditaments and premises was sold and conveyed by Allan, in 1829, to the defendant John Curtis. The plaintiff filed his bill against John Curtis, praying an account of what was due to the plaintiff in respect of his mortgage debt of 1,019*l.* 7*s.* 4*d.* and the interest thereof, and the usual decree of foreclosure. Allan had previously died in 1830, but the tenant for life of the property was stated to be still living. There was some correspondence in evidence, from which it appeared that the parties to the mortgage of 1814 did not contemplate a security which would be enforceable during the lifetime of the tenant for life, but the judgment turned upon the construction of the deed, which makes it unnecessary to set forth the correspondence.]

[615]

Mr. Simpkinson and *Mr. James Russell*, for the plaintiff :

[It is objected that the mortgage is a Welsh mortgage, but the deed contains a covenant for payment of the principal and interest on demand. In a Welsh mortgage there is no covenant for the payment of the money, and no right of action in the mortgagee to compel the repayment: the terms of the contract are, that the money shall be paid by perception of the rents and profits: *King v. King*,† *Lawley v. Hooper*,‡ *Howell v. Price*.§]

[616]

In *Hartpole v. Walsh*,|| which was the case of an Irish mortgage: the principal money was payable whenever the mortgagee should give eighteen months' notice to the mortgagor; and yet, the mortgagee having been in possession for a great many years, the Court dismissed the bill for redemption. The only difference between that case and the present, is, that there eighteen months' notice was required for payment of the money; in the present

† 3 P. Wms. 358.

‡ 3 Atk. 280.

§ 1 P. Wms. 291.

|| 5 Br. P. C. 267, Toml. edit.

case, it is payable on demand, and the demand is admitted. It is impossible to give any effect to the deed without considering the whole of the covenants. Taken together, they necessarily control each other—*Browning v. Wright*.† The mortgage is therefore clearly a good and subsisting mortgage, and the plaintiff is entitled to foreclose the equity of redemption.

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Mr. Boteler and Mr. Barber for the defendant :

The covenants throughout are not such as would be *found in an ordinary mortgage. The effect of the deed is consistent throughout. The covenant to pay on demand, and the covenant for quiet enjoyment, and the other covenants, are quite incompatible with a common mortgage. It has been said that this is not a Welsh mortgage, on account of the covenant for payment of the mortgage money. It is quite immaterial what the contract is ; the question is, what would be the effect of a decree of foreclosure. It would be to work a forfeiture where none is intended to be given by the deed. [They also referred to the correspondence above mentioned.]

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Mr. Simpkinson replied.

LORD LYNDEHURST, C. B. :

* * In this case, Allan being indebted to Teulon, who is the plaintiff in this case, in the sum of 1,000*l.*, it was agreed between them that Allan should grant a lease for five hundred years of the property in question. And it was provided, and Teulon covenanted, that, in the event of the money being paid, the lease should terminate and be void. There was also a covenant, on the part of Allan, to pay the money on demand. And it was further provided, that, until the money should be paid, Teulon might occupy the premises.

Dec. 5.

[618]

The case turned on the construction of the deed.

In the proviso, no limitation is made as to the time for payment of the money, nor as to the terms of redemption. But it was contended that the subsequent covenant by Allen had the effect of giving a limitation to the proviso. I take the rule of law to be this, as to the construction of covenants, that, where there

† 5 R. R. 521 (2 Bos. & P. 13).

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[*619]

are two covenants, which, when considered according to their grammatical import and legal effect, are consistent, you must so construe them as to give effect to both of them. Now, these two stipulations *do not appear to me to be at variance with each other, either according to their grammatical import or their legal effect. It is not at all inconsistent that a party should stipulate that he should hold the property till his debt should be paid, and that the debtor should covenant to pay the debt on demand ; the covenant and the proviso are not therefore inconsistent. The case cited from Bosanquet & Puller's Reports† does not apply to the present question. In that case, there was a grant of lands in fee, and a covenant by the vendor, that, notwithstanding any act done by him to the contrary, he was seised in fee, and that he had full power to convey the same ; and the question was, whether the words, notwithstanding any act done by him to the contrary, over-rode the whole clause—and the Court held that they did. The decision has, therefore, no bearing on the present case : and it is impossible to suppose that what has been contended for could have been the intention of the parties to this deed ; for, if so, the money might have been demanded immediately after the execution of the deed, and the mortgagee's estate have instantly become absolute.

[*620]

In *Hartpole v. Walsh*, the mortgagor covenanted to pay the mortgage money within eighteen months after demand, and he also covenanted for the quiet enjoyment of the premises by the mortgagee. So far the cases are analogous. But in that case there had not been any interest received for thirty years ; a bill was then filed to redeem the mortgage under special circumstances ; the cause was not prosecuted with reasonable despatch ; sixty years afterwards elapsed, when a bill to redeem was dismissed, and, on appeal, that decree of dismissal was affirmed. It does not appear on what grounds the decree in the Chancery of Ireland was pronounced, nor on what grounds it was affirmed in the House of Lords. But it is material to notice, that, fifty years before the decree was pronounced, an interlocutory order had been made referring it to the Master *to take the accounts. It is most probable that the decree proceeded and was affirmed

on the ground of the impossibility of taking long and complicated accounts at such a distance of time.

The case does not therefore appear to me to be an authority in opposition to the construction I have given this deed, and which construction appears to me to be consistent with the correspondence and the intention of the parties, as evidenced by the letters.

The bill must be

Dismissed, but without costs.

CURTIS v. HOLCOMBE.

(6 L. J. (N. S.) Ch. 156.)

[THE defendant Curtis afterwards filed a bill for the redemption of the above-mentioned mortgage which had been assigned to Holcombe, and the case is reported under the title of *Curtis v. Holcombe*, in 6 Law Journal (N. S.) Ch. 156.]

Mr. Barber and Mr. Kindersley, for the plaintiff. * * *

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Mr. Pemberton and Mr. James Russell, for the defendant, contended, that as the defendant had not been permitted to foreclose, the plaintiff ought not afterwards to be allowed to redeem. * * *

THE MASTER OF THE ROLLS said that * * the plaintiff might be entitled to redeem, although the defendant had no right to foreclose; and as to the costs, there was no reason for depriving the defendant of his costs, as the points raised by him had been suggested to him by the plaintiff himself, in the other suit. That he considered the plaintiff could not come for redemption, without being in some way or other bound to redeem, and he ought not to be allowed to obtain a decree for redemption, and afterwards avail himself of the peculiar form of the deed to decline a redemption. He must redeem, and, if necessary, be foreclosed on his not redeeming.

The cause was afterwards put into the paper, and * * a decree was made for redemption, in the usual terms, "but in default of the plaintiff so redeeming the said mortgage by the time aforesaid, the plaintiff's bill was from thenceforth to stand dismissed out of this Court, with costs, to be taxed by the Master."

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CURTIS.

1837.
Jan. 16, 27.

Rolls Court,
Lord
LANGDALE,
M.R.

IN THE KING'S BENCH.

1829.
 Nor. 7.
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WILLIAMS v. WARING.†

(10 Barn. & Cress. 2—3; S. C. 5 Man. & Ry. 9; 8 L. J. K. B. 7; Lloyd & Welsby, 48.)

Where, by a memorandum at the foot of a promissory note, it was made payable at a particular place: Held, that this did not constitute a part of the contract, so as to make it necessary for a party suing on the note to aver and prove a presentment there.

ASSUMPSIT on a promissory note, by the indorsee against the maker. Plea, *non assumpsit*. At the trial before Jervis, J. at the last Summer Assizes for Denbighshire, the note, when produced in evidence, appeared to be in the following form:

“31st January, 1827.

“Two months after date, I promise to pay to A. B. 25*l.*, value received.

“J. WARING.

“At Messrs. B. & Co.’s, Bankers, London.”

The whole of the note, including the memorandum in the corner, was in the handwriting of the defendant, the maker of the note, and the memorandum was proved to have been written at the time when the note was made. For the defendant it was contended, that the note should have been described in the declaration as payable at Messrs. B. & Co.’s; and that evidence of presentment there should have been given. The learned Judge overruled the objection, but gave the defendant leave to move to enter a nonsuit.

Campbell now moved accordingly, and contended, that as the memorandum at the foot of the note was written by the maker at the time of making the note, it was as much parcel of the contract as if it had been in the body of the instrument; and that consequently *presentment at the house where the note was made payable, should have been averred and proved: *Trecothick v. Edwin*.‡

† Bills of Exchange Act, 1882,
 sect. 87.—R. C.

‡ 1 Stark. 468.

LORD TENTERDEN, Ch. J.:

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In point of practice, the distinction between mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case it has been treated as a memorandum only, and not as part of the contract; and I do not see any sufficient reason for departing from that course.

BAYLEY, J.:

The case of *Exon v. Russell*[†] is expressly in point for the present plaintiff, with this single exception, that the memorandum in that case was not proved to have been written by the defendant. But it was there at the time when the note was made, and therefore the effect of it was the same; and the plaintiff having averred that the note was payable at the particular house, the Court held that it was misdescribed. That is a sufficient authority for a decision in this case in favour of the plaintiff.

*Rule refused.*MITCHELL AND ANOTHER v. BARING AND OTHERS.[‡]1829.
Nov. 9.

(10 Barn. & Cress. 4—11; S. C. 8 L. J. K. B. 8; Lloyd & Welsby, 41;
S. C. at Nisi Prius, 4 Car. & P. 35; Moody & Malkin, 381.)

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A foreign bill of exchange was drawn on C. & Co. at Liverpool, payable to A. in London. The drawees having refused to accept, the bill was accepted by B. in London for the honor of the payee, if regularly protested, and refused when due: Held, in an action against the acceptor for honor, that, by the special form of the acceptance, a presentment for payment to the drawee in Liverpool, a refusal by him, and a protest there, were necessary, and, therefore, that the bill was properly presented for payment there on the day it became due.

ASSUMPSIT on a bill of exchange. The first count of the declaration stated that James Butler Clough on the 18th of July, 1825, in parts beyond the seas, to wit, at Charleston, made his certain bill of exchange, directed to Messrs. Crowder, Clough, & Co., Liverpool, and requested them, sixty days after sight of that his said James Butler Clough's first of exchange (2nd, 3rd and 4th unpaid,) to pay to Messrs. Le Roy, Bayard, & Co. therein mentioned,

[†] 4 M. & S. 505.[‡] Bills of Exchange Act, 1882, s. 51 (6).

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or order in London, the sum of 500*l.* sterling, value received, and delivered it to the last mentioned persons who indorsed it to the plaintiffs; that on the 30th of August, 1825, to wit, at London aforesaid, the bill was presented to Messrs. Crowder, Clough, & Co., who then and there had sight of it, and were requested to accept the same, but did not nor would then or at any time before or afterwards accept the same, or pay the sum of money therein specified, but wholly refused so to do; nor did nor would they then or at any other time, accept or pay said second, third, or fourth of exchange, in the said bill mentioned, or any of them, but therein wholly failed and made default; that the said bill was duly protested for non-acceptance, whereof the defendants on, &c. at, &c. had notice, and thereupon the defendants on, &c. at, &c. in order to prevent the said bill from being sent back and returned to Messrs. Le Roy, Bayard, & Co. did accept the said bill under protest, for honour of Le Roy, Bayard, & Co., and undertook that the bill should *be paid for the account of Le Roy, Bayard, & Co. if regularly protested, and refused when due, and did subscribe the said acceptance on the said bill, according to the usage and custom of merchants; that the bill when it became due, to wit, on the 1st of November, 1825, to wit, at London aforesaid, was shewn and presented for payment to the persons to whom it was directed; and the said last mentioned persons were then and there requested to pay the sum of money in the bill specified, according to the tenor and effect of the bill; but that neither the said persons to whom it was directed, nor any other person on their behalf, did or would pay the bill, but wholly refused and neglected so to do; and thereupon the bill was on the same day and year last mentioned, at London aforesaid, duly protested for nonpayment thereof, of all which premises the defendants had notice; by means whereof the defendants became liable to pay the plaintiffs the said sum of money in the bill specified, according to the tenor and effect of the bill, and of their acceptance. And being so liable the defendants in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook and faithfully promised the plaintiffs to pay them the said sum of money in the bill specified, according to the tenor and effect of the bill and of the said defendants' acceptance. Plea, general issue. At

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the trial before Lord Tenterden, Ch. J., at the London sittings after last Trinity Term, it appeared that the action was brought upon the following bill of exchange, drawn at Charleston, in America, on the 18th of July, 1825. "Sixty days after sight of this my first of exchange, second, third, and fourth unpaid, pay to Messrs. Le Roy, Bayard, & Co. or order in London, 500*l*. sterling, value received, and place to account, as advised *by James Butler Clough. To Messrs. Crowder, Clough, & Co., Liverpool." It was indorsed by the payees to the plaintiffs. The bill was presented for acceptance to the drawees at Liverpool, but they, having previously stopped payment, refused to accept. The plaintiffs then applied to the defendants, the correspondents of Le Roy, Bayard, & Co. to accept it for their honour, and the defendants accepted the bill in the following terms: "Accepted under protest, for honour of Messrs. Le Roy, Bayard, & Co. p. 3178, and will be paid for their account if regularly protested, and refused when due." The bill having become due on the 1st of November, 1825, was by the plaintiffs presented for payment to the drawees at Liverpool. They having refused to pay it, it was presented for payment to the defendants on the 3rd of November, when they refused to pay it, on the ground that it had not been presented to them for payment on the 1st of November, the day it became due. It was contended on the part of the defendants, that the bill ought to have been protested for nonpayment in London. Several witnesses were called, some of them being notaries and others merchants, who stated, that where a foreign bill drawn upon a merchant residing at Liverpool, payable in London, is refused acceptance by the drawee, the usage is, to protest it for nonpayment in London. The bill is put into the hands of a notary, and he formerly used to make protest at the Royal Exchange; but that custom has now become obsolete; the notary now is merely desired by the holder to seek payment of the bill, and on a declaration by the latter, that the drawee has not remitted any funds, or sent to say where the bill will be paid, the notary at once marks it as protested for nonpayment. In that case it is presumed that the drawee in Liverpool, to whom the bill has been *presented for acceptance (who thereby has the means of ascertaining who the holder is), is aware

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of its being due; and it is his duty to transmit the funds to the holder, or to communicate to him where the bill will be paid in London. For the plaintiffs two notaries from Liverpool were called, who stated, that their uniform practice had been in the case of foreign bills drawn on persons in Liverpool, payable in London, to present for payment at the domicile of the drawee in Liverpool, and protest for nonpayment there. Lord TENTERDEN told the jury, that the general rule which required the protest to be made at the domicile of the drawee must prevail, unless they were satisfied that mercantile usage required the holder to protest in London. The evidence given by the defendants only shewed, that where the holder of the bill resided in London, it was not necessary, according to usage, to send the bill to Liverpool for protest; but that the question in this case was, whether the presentment and protest in Liverpool were not sufficient; and he told them, that if they thought that by the uniform usage the holder of such a bill was bound to protest it in London, they would find for the defendants, otherwise for the plaintiff. While the jury were deliberating his Lordship again addressed them, saying, that in his opinion, by the peculiar form of acceptance in this case, the question of usage was excluded altogether, for the defendants undertook to pay the bill only if regularly protested, and refused when due. Here the bill could not have been regularly protested and refused when due, unless payment had been demanded from the drawees, whose duty it was to pay it. The latter could not be said to have refused to pay until they had been asked. The defendants, by the express terms of their acceptance, had made a presentment to the drawees necessary.

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*The presentment at Liverpool was therefore proper, and the plaintiffs were entitled to recover. A verdict having been found for the plaintiff,

Gurney now moved for a new trial :

It was fully established by the evidence, that where a bill payable in London has been drawn upon a party at Liverpool, and refused acceptance, the usage is, to protest it, for want of payment, in London. It is true, that the acceptance in this case is in very special terms. The words " refused when due," import

only that the bill should be virtually refused by the drawees making no provision for it. The drawees having had it presented to them for acceptance, must have known when it became payable; and the omission to provide funds at the place where it was payable, was, virtually, a refusal to pay by the drawees. Suppose the drawees to have lived at Calcutta, it would not have been necessary to present the bill for payment at Calcutta.

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(LORD TENTERDEN, Ch. J. : It is not very likely that such a bill would ever be accepted for honor in London.

BAYLEY, J. : Is it not necessary that there should be a presentment for payment?)

Not if the drawee has no domicile in the place where the bill is to be paid. If it were made payable at a particular banking-house in London, it would be necessary to present it there; but where no place is designated in the bill, the invariable usage has been, not to present it, but at once to protest it for nonpayment: the omission to pay by the drawees (who having refused to accept it must know that it is due) being deemed equivalent to a refusal.

LORD TENTERDEN, Ch. J. :

I was disposed at one time to have left it to the jury as a mercantile question on *the usage, but it occurred to me that this differed from the case of a general acceptance for honour, the terms being very special—"if regularly protested and refused when due." I thought, and still think, that, though there might be an omission, there could not be a refusal to pay unless there was a presentment and demand of payment. The verdict of the jury must certainly be considered as having been given under my direction, and not as the result of their opinion. The fair effect of the evidence of usage given by the defendants was, that if the holder of the bill resided in London, he was not bound to send the bill to Liverpool to get it protested; but it did not prove that a presentment and protest at Liverpool were not sufficient.

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MITCHELL BAYLEY, J. :

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In *Williams v. Germaine*[†] the judgment was arrested because it was not alleged in the declaration that the bill, when it became due, was presented to the drawees for payment. The language of this acceptance imports that some attempt was to be made in order to obtain payment. That could only be made in the place where the party who ought to pay the bill resided. It is convenient for the purposes of commerce to require a personal application to be made to the individual by whom the payment is to be made, at the place of his domicile, if he has designated no other place. It appears to me, therefore, that Liverpool was the proper place to make the presentment for payment. It is true, that upon the original formation of this bill, the party was entitled to have an acceptance payable in London; but there having been no acceptance by the drawees payable in London, it appears to me that Liverpool, the *place where the drawees resided, was the proper place where the presentment should have been made, no other place being designated on the bill.

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LITTLEDALE, J. :

The words of the defendant's acceptance for honor, "if regularly protested and refused when due," import, that there must be a distinct act of refusal; and unless there be a request there cannot be a refusal. It is unnecessary to decide the general question, whether, if the acceptance had been in the usual form, the protest in London would have been sufficient. The more regular way appears to me to be, to apply personally to the drawee himself, if he has any residence where the bill can be presented. In this case the drawee had a domicile at Liverpool, which was known, for the bill had been presented there for acceptance. There could not be any difficulty, therefore, in presenting it for payment at the same place. However that may be, I think that, under the special form of acceptance, it was absolutely necessary, before any claim could be made on the persons who accepted it for honor, to present the bill to the drawees; for it is only on their refusal to pay the bill when it became due, that the defendants undertook to pay it.

[†] 31 R. R. 248 (7 B. & C. 466).

PARKE, J. :

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It appears to me, that by the peculiar form of acceptance, enquiry into the alleged custom of merchants was irrelevant and unnecessary. Messrs. Baring say, that they accept the bill for the honor of certain individuals, and will pay it if the bill be regularly protested and refused when due. The collocation of the words is improper; they would stand more correctly, "if refused when due, and regularly protested." The refusal as well as the protest is provided for. To *constitute a refusal of payment, it was necessary that the bill should be again presented to the persons who, by the terms of the bill, were required to pay it. If it had been regularly presented to the drawees, and payment had been refused by them, and then regularly protested, (which, I should conceive, must be at the place where it was presented and refused,) in that case the holder of the bill would have been entitled to recover against the defendants according to the acceptance.

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Rule refused.

J. LEWIS AND W. LEWIS v. MARLING.

(10 Barn. & Cress. 22—28; S. C. 5 Man. & Ry. 66; 8 L. J. K. B. 46; Lloyd & Welsby, 28; Web. P. C. 493; 1 Carp. P. C. 475; S. C. at Nisi Prius, 4 Car. & P. 52; Web. P. C. 490.)

1829.
Nov. 11.

[22]

Where a patentee of an improved machine claimed as his invention a part of it which turned out to be useless: Held, that this did not vitiate the patent, the specification not describing the part as essential to the machine.

Where it appeared in evidence that the patentee himself invented and brought into use the machine for which the patent was granted; but before that time several other persons had seen a model and specification of such a machine, which were brought over from America: Held, that the patentee was nevertheless to be considered the inventor within the meaning of the Statute of Monopolies, no machine having been manufactured and brought into use from the model and specification, and there being no evidence that the patentee had ever seen them.

CASE for infringing a patent granted to the plaintiffs for improvements on shearing machines for shearing or cropping woollen and other cloths. Plea, not guilty. At the trial before Lord Tenterden, Ch. J., at the Westminster sittings after last Trinity Term, it appeared that the patent in question was granted

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in 1818, and the plaintiffs in their specification (which was accompanied by a drawing) claimed as their invention, thirdly, "the application of a proper substance fixed on or in the cylinder A to brush the surface of the cloth to be shorn;" and, fourthly, "the described method of shearing cloth across from list to list by a rotatory cutter." The brush for the surface of the cloth was soon found to be useless, and the plaintiffs never sold any machines with it. On *this ground the defendant contended that they had claimed too much, and therefore the patent was void. As to the fourth thing claimed, the defendant contended that it was not new, and proved that a similar machine was in use at New York twenty years ago, and that a specification of it was sent over in 1811 to one Thompson, residing at Leeds, who employed two engineers to manufacture a machine from it; but this was never finished in consequence of the disturbances made by the Luddites. This specification was shewn to several persons, but the machine was never brought into use. It appeared also that in 1816 a model for a machine to shear from list to list by means of a rotatory cutter was brought over from America by one Smith, and he shewed it to three or four persons in his manufactory, but no machine was ever made from it, nor was it publicly known to exist; and Smith always used machines manufactured by the plaintiffs. It appeared also that many years ago one Coxon had made a machine to shear from list to list, which was tried by a person called on behalf of the defendant, but he did not think it answered, and soon discontinued the use of it. For the defendant it was contended that this evidence deprived the plaintiffs of the right to a patent, as their invention was not new. Lord TENTERDEN told the jury that the first objection failed, as the plaintiffs had not described the brush to be attached to the cylinder, as an essential part of their invention, and therefore the patent might be good although further investigation proved that part of the invention to be useless. And as to the other, that as the invention of the machine for shearing from list to list by a rotatory cutter had not been generally used or known in this country, the plaintiffs might be considered *the inventors within the meaning of the statute 21 Jac. I. c. 3, s. 6, notwithstanding the specification and the model which had been

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[*24]

brought over from America, and the making of a machine to work in that manner by Coxon, and his Lordship left to the jury the questions whether it had been generally known, and whether the patent had been infringed by the defendant. The jury found a verdict for the plaintiffs; and now

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F. Pollock moved for a rule *nisi* for a new trial on the grounds urged at the trial:

First, the patent was void on the ground that the plaintiffs claimed as part of their invention the application of a brush for the purpose of raising the nap on the cloth. That proved to be entirely useless, if not prejudicial, and in fact they never sold any machines with the brush attached. The public, therefore, would be misled, if at the expiration of the time for which the patent was granted they attempted to manufacture a machine on the patent principle. The answer given to this objection at the trial was, that the specification did not describe the brush as an essential part of the machine. But that is no answer in law, the defendant has a right to consider the case as if the patent had been taken out for that only. In every patent, all that is claimed must be new and useful: *Turner v. Winter*,† *Crompton v. Ibbotson*.‡

(*PARKE, J.*: The specification there stated, that a certain article would produce the desired effect. The evidence was, that nothing else would do it.)

Secondly, Lord TENTERDEN did not leave the question of novelty to the jury in the manner warranted by former decisions. The *substance of the invention was the application of a rotatory cutter in shearing cloth from list to list. The evidence was, that thirty years ago one Coxon made such a machine, in 1811 a specification in which that principle was stated was brought over from America, and a machine commenced but never finished. In 1816, a model of such a machine was brought over, and although no machine was made from it, the model was shewn to various persons. The person who brought it over could not,

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† 1 R. R. 311 (1 T. R. 602).

‡ *Danson & Lloyd*, 33.

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after that, have maintained a patent for it; and if he could not, it is difficult to understand why the plaintiffs should be in a better situation.

(PARKE, J. : It might be new in use although the principle was known before.)

Affidavits were then produced as to the knowledge of that whereof the plaintiffs claimed to be inventors before the patent was granted.

LORD TENTERDEN, Ch. J.:

I am of opinion that we ought not to grant a rule to disturb the verdict in this case. It is contrary to the usual practice to grant a rule in such a case on affidavits. If the facts disclosed in them are sufficient to vitiate the patent, it may be repealed by *scire facias*. As to the objection, on the ground that the application of a brush was claimed as a part of the invention, adverting to the specification, it does not appear that the patentee says the brush is an essential part of the machine, although he claims it as an invention. When the plaintiffs applied for the patent, they had made a machine to which the brush was affixed, but before any machine was made for sale they discovered it to be unnecessary. I agree, that if the patentee mentions that as an essential ingredient in the patent article, which is not so, nor even useful, and whereby he misleads *the public, his patent may be void; but it would be very hard to say that this patent should be void, because the plaintiffs claim to be the inventors of a certain part of the machine not described as essential, and which turns out not to be useful. Several of the cases already decided have borne hardly on patentees, but no case has hitherto gone the length of deciding that such a claim renders a patent void, nor am I disposed to make such a precedent. The next point was an alleged misdirection on my part to the jury. To impugn the novelty of the invention, evidence was given that one Coxon had previously made a machine for shearing from list to list; but it was not approved of, and never came into use. Another piece of evidence was, that a model had been sent over from America and exhibited to a few persons, but

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no machine was made from it, and the very persons who had the model, bought and used machines manufactured by the plaintiffs. It was also proved that a specification had been brought over from America, and two persons employed to make a machine from it. But that never was completed, so that until the plaintiffs' invention came out, no machine was publicly known or used here for shearing from list to list. I told the jury, that if it could be shewn that the plaintiffs had seen the model or specification, that might answer the claim of invention; but there was no evidence of that kind, and I left it to them to say, whether it had been in public use and operation before the granting of the patent. They found that it had not, and I think there is no reason to find fault with their verdict.

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BAYLEY, J. :

I am of the same opinion. To support a patent, it is necessary that the specification should *make a full and fair disclosure to the public of all that is known to the patentee respecting his invention. If it does not, the consideration on which he obtains his patent fails. If he represents several things as competent to produce a specific effect, when only one will answer, that is bad; or if he suppresses any thing which he knows will answer, that also is bad. But it is objected here, that the plaintiff described the application of a brush as parcel of his discovery. At the time when the patent was obtained a brush was used, and there is no reason to doubt that the plaintiffs at that time thought it necessary. That objection, therefore, fails. On the other point, if the model brought from America had been seen by the plaintiff, he could not afterwards have claimed to be the inventor. But if I discover a certain thing for myself, it is no objection to my claim to a patent that another also has made the discovery, provided I first introduced it into public use. Here there was no ground to doubt that the plaintiffs were the inventors of the machine, and first introduced it into public use.

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PARKE, J. : †

The objection to the patent as explained by the specification

† Littledale, J. was in the Bail Court.

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may be thus stated. The patent is for several things, one of which then supposed to be useful is now found not to be so ; but there is no case deciding, that a patent is on that ground void, although cases have gone the length of deciding, that if a patent be granted for three things, and one of them is not new, it fails *in toto*. The prerogative of the Crown as to granting patents was restrained by the statute *21 Jac. I. c. 3, s. 6, to cases of grants, "to the true and first inventors of manufactures, which others at the time of granting the patent shall not use." The condition, therefore, is, that the thing shall be new, not that it shall be useful ; and although the question of its utility has been sometimes left to a jury, I think the condition imposed by the statute has been complied with, when it has been proved to be new. There was no evidence in this case to shew that the plaintiffs were not the inventors of this machine, in this country at least. But the statute further requires that it shall not have been used by others, and it is said that the latter part of the condition has not been satisfied. But there was no evidence of the use of such a machine before the grant of the patent, and there is no case in which a patentee has been deprived of the benefit of his invention because another also had invented it, unless he had also brought it into use. Upon these grounds, I think that neither of the objections taken ought to prevail, and that the plaintiffs are entitled to retain the verdict found in their favour.

Rule refused.

1829.
Nov. 12.

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MARY DAVIS v. R. CAPPER, Esq.

(10 Barn. & Cress. 28—38 ; S. C. 5 Man. & Ry. 53 ; 8 L. J. M. C. 67 ; S. C. at Nisi Prius, 4 Car. & P. 134.)

Trespass will lie against a magistrate for committing a party charged with felony for re-examination for an unreasonable time, but without any improper motive.

Semble, That a warrant of commitment for an unreasonable time is wholly void.

THIS was an action of trespass against the defendant, a justice of the peace for the county of Gloucester, for assaulting and imprisoning the plaintiff, and detaining her in prison for fifteen

days. Plea, not guilty. At the trial before Gaselee, J. at the Summer Assizes for *the county of Gloucester, 1828, the following appeared to be the facts of the case. On the 5th of January, 1828, the plaintiff, who had lodged in the house of one Ann Hamerton, made a deposition that her property had been stolen, and that part of it had been discovered in the possession of Ann Hamerton; but the latter was not at that time committed on such charge. On Sunday the 27th of January, Ann Hamerton sent for Russell the superintendent of the Cheltenham police, and told him she had been robbed while Mary Davis lived with her. She produced a letter addressed to the plaintiff at Miss Hamerton's house, and bearing the Cheltenham post-mark; and alleging that upon looking in at the ends, she believed it to contain some allusion to the robbery, induced Russell to break it open. The letter, which was anonymous, purported to come from an accomplice in the robbery residing at London, who demanded payment at the hands of the plaintiff as a joint perpetrator of the offence, and stated, that he would await her answer for a fortnight. Miss Hamerton also told Russell, that four days after the robbery a letter had arrived for the plaintiff in the same handwriting, with the London post-mark, and that the plaintiff had refused to shew it; she then expressed her suspicions of the plaintiff being concerned in the robbery, and said she thought Russell ought to take her into custody. He then took the plaintiff into custody, and on the following morning carried her before the defendant; and upon the information of Ann Hamerton that she, during the time the plaintiff lived in her house, had lost various articles of bed-furniture and wearing apparel described in the information, and that she had reason to suspect and did suspect that Mary Davis was concerned in the robbery, the defendant *committed her to the Bridewell at Northleach, and by his warrant required the gaoler to keep her in custody until the 12th of February, and then to bring her up for re-examination. The alleged anonymous letter was produced and read before the magistrate. On the 12th of February she was taken before two magistrates (the defendant not being one of them) for re-examination, and was re-committed by them. On the 16th of February she was again brought up before the defendant, and he discharged her;

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on that day the defendant said that there was no evidence against her, that he would have discharged her on the 12th if he had been present at the examination, and that he committed her in the first instance until the 12th, thinking she would by that time have stated who had written the letter. No evidence was given on the part of the defendant.

It was contended by the defendant's counsel, that a magistrate might in his discretion commit for further examination for such time as he thought proper; and that even if he exercised his discretion improperly, trespass would not lie against him.

The learned Judge was of opinion that the action was not maintainable, but in order to save the expense of another trial, he left it to the jury to say, 1st, whether the commitment was made *bonâ fide* for the purpose of further examination, or for the purpose of compelling the plaintiff to state who the writer of the letter was. And secondly, whether in their judgment, the time for which the defendant had been committed was reasonable. The jury retired, and after being out several hours, stated that they could not agree; upon which they were discharged, and the learned Judge nonsuited the plaintiff.

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A rule *nisi* was afterwards obtained for a new trial, on the ground that there was evidence to go to the jury *that the commitment was for the purpose of extorting a confession, and not for re-examination, and therefore illegal. And secondly, assuming that the commitment was made *bonâ fide* for the purpose of re-examination, that the time for which the plaintiff had been committed by the defendant was unreasonable, and therefore the warrant was illegal.

W. E. Taunton now shewed cause :

If the defendant in this case maliciously and without any reasonable or probable cause committed the plaintiff, the form of action should have been case not trespass. The defendant had jurisdiction over the subject-matter of the complaint which was made on oath, and, if he had, then if the warrant be lawful on the face of it, trespass is not maintainable. The warrant is in the usual form, the magistrate thereby requiring the gaoler to keep the plaintiff until the 12th of February, to be dealt with

according to law. Now, first, the time for which a prisoner shall be committed for re-examination, is in all cases a question for the discretion of the magistrate, and his judgment exercised *bonâ fide* upon that point is conclusive. But, secondly, assuming that to be otherwise, if under any circumstances the warrant can be good, it is a sufficient answer to the action. Now here the defendant may have given credit to the assertion in the anonymous letter, that the writer would wait a fortnight, and therefore committed the plaintiff for that period for further examination. A fortnight may be too long a time, but it is not necessarily so. In *Scarage v. Tateham*† it does not appear that there was any examination, and if there was not, the magistrate had no power to commit.

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BAYLEY, J. :

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The rule for a new trial must be made absolute. I have no doubt on one question that a magistrate may commit for re-examination. It seems to me quite clear, however, that it ought to have been left to the consideration of the jury whether the commitment was made *bonâ fide* for the purpose of re-examination, or for the purpose of extorting a confession. The declaration of the defendant that he committed the plaintiff till the 12th, thinking she would by that time tell who was the writer of the letter, is evidence to go to the jury that he did not commit for the purpose of a re-examination. On the other ground, the authorities are very strong to shew that a magistrate ought not arbitrarily to commit, even for re-examination, for such a length of time as the defendant did in this case. The duty of the magistrate is pointed out in Hale's P. C.‡ It is there said, "Where a party arrested for felony is brought before a justice, he must either discharge, or commit, or bail him." But, preparatory to these acts, there are some things that are required of him before he do either. By the statute 1 & 2 Phil. & M. c. 13, and 2 & 3 Phil. & M. c. 10, (which are re-enacted in Mr. Peel's Act,§) he is to take the information upon oath of the prosecutor and witnesses, and put them into writing; and he is likewise to take

† Cro. Eliz. 829.

‡ C. 14, vol. ii. 120.

§ 7 Geo. IV. c. 64. See now
11 & 12 Vict. c. 42.—R. C.

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the examination, but this is to be without oath, and put into writing. And because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the justice's house, or committed to some near safe place of custody, till the *examination can be taken. But this must be despatched in some convenient time. He then refers to the case of *Scarage v. Tateham*.† That was an action for false imprisonment in London, from the 10th of September to the 29th of September. The defendant justified; that he was mayor and justice of the peace in Pomfret, and that robbery was done there, and the plaintiff was thereof suspected and brought before him, and therefore he detained him in his house during that time to examine him and one Pole, who was not apprehended, concerning the robbery; and afterwards, upon the 29th of September, delivered him over to the new mayor, and traversed the imprisonment in London. And upon demurrer it was adjudged that the inducement to the traverse was not good, for a justice of peace cannot detain a person suspected in prison but during a convenient time, only to examine him, which the law intends to be three days, and within that time to take his examination and send him to prison, for he ought not to detain him as long as he pleaseth, as he here did, eighteen days. That case would seem to shew that the law has fixed three days as a reasonable time, but it seems to me that the time for which a party may be committed for re-examination may vary according to circumstances. Those circumstances ought to have been detailed in evidence in this case, and then if it were a mere question of law, the Judge ought to have determined it. If it were a mixed question of law and fact, the Judge and jury ought to have decided it. In Burn's Justice, a case of *Rex v. Gooding* is stated in a note. Gooding had been convicted at the London Sessions, in May, 1820, for *assisting J. H. Davis to escape from the Giltspur Street Compter, where he had been confined on a charge of forgery. The case was afterwards submitted by his Majesty to the Judges, in consequence of a petition presented by the prisoner, Gooding, alleging that Davis never was in legal

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† Cro. Eliz. 829.

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custody, and therefore he (Gooding) could not legally be found guilty in aiding his escape; the fact being, that Davis at the time of the escape was under commitment for further examination merely, but no warrant, commitment, or written authority, was ever made out by the Lord Mayor (who was the committing magistrate) or any other justice of the peace. The only question submitted to the Judges was, whether a commitment for further examination was legal, not being in writing? Their Lordships were unanimously of opinion that such a commitment for a reasonable time, though not in writing, was good.† But they added, that they considered reasonable time to be a mixed matter of law and fact; and that as the facts of the case were not fully detailed, they could form no opinion, in fact, whether the time in the particular case was or was not a reasonable time: but they presumed that it must have appeared at the trial that the time was reasonable, as otherwise he ought to have been acquitted. The Judges, therefore, were of opinion that it would depend on the facts of the case whether the time for which the party was committed was reasonable or not, and that the judgment of the magistrate was not conclusive. Unless the facts, therefore, which induced the defendant to commit for such a length of time be detailed, we cannot say whether the time for which the plaintiff in this case was committed *was reasonable or not. Here the facts are not detailed in evidence; the defendant called no witnesses. I am therefore of opinion, on both grounds, that the rule for a new trial should be made absolute.

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LITLEDALE, J. :

I think that this case ought to be submitted to another jury, in order that they may consider whether the plaintiff was committed for further examination, or for the purpose of extorting a confession.

PARKE, J. :

I also think that the rule for a new trial should be made absolute, for the reason given by my brother LITLEDALE. As to the other point, I concur with my brother BAXLEY, that it is

† See 2 Hale, P. C. 120, 121.

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a mixed question of law and fact for the consideration of the jury, whether the time be reasonable or not. That seems to be established by the case of *Scarage v. Tateham*; for though the decision in that case may have proceeded either on the ground, that the party had been, improperly committed to the house of the justice instead of the county gaol, or that he had been delivered over to the mayor without examination, yet it appears from the report rather to have proceeded on the ground that a justice has only power to detain a person suspected in prison during a convenient time to examine him; and that is considered to be the ground of the decision, by Lord HALE in the passage already referred to. It is clear, that in *Rex v. Gooding* the Judges thought the time for which the Lord Mayor had directed the party to be confined was not to be considered conclusively as reasonable, but that the reasonableness of the time was a question to be decided by the Judge and jury. If, however,

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there be any doubt upon this point, the defendant *will, upon a second trial, have an opportunity of raising it upon the record.

Rule absolute.

The cause was tried again at the Summer Assizes, 1829, for the county of Gloucester, before Vaughan, B., who directed the jury to find, first, whether the defendant in committing the plaintiff for the time mentioned in the warrant acted *bonâ fide*, or was influenced by some improper or indirect motive; and if they thought he committed *bonâ fide* for re-examination, whether the commitment was for a reasonable time; expressing his own opinion that the time was unreasonable under the circumstances. The jury found that the commitment was *bonâ fide* and intended for re-examination only, but that it was for an unreasonable time; and they assessed the plaintiff's damages at 10*l*. The learned Judge gave leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that trespass could not be maintained for such unreasonable commitment without improper or indirect motive. On a former day in this Term

W. E. Taunton moved to enter a nonsuit:

If the magistrate had no jurisdiction to commit, and his defect

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of jurisdiction had appeared on the face of the warrant, trespass would have been maintainable: *Groome v. Forrester*.† But here the warrant was good on the face of it. It had all the requisites of a good commitment, it was under the seal of the magistrate, contained the cause of commitment, and had an apt conclusion: Hale's Pleas of the Crown, 588. In the same work, p. 584, Lord *Hale, speaking of cases of felony, says, "The want of certainty seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony." The defendant, at all events, had jurisdiction to commit for a reasonable time. The warrant is good for such time, and it is void only as to the excess. Trespass will not lie, unless the commitment be altogether bad, so as to entitle the party committed to a discharge on a *habeas corpus*, although the converse does not hold, for a party may be entitled to his discharge on a *habeas corpus*, when he could not maintain trespass for false imprisonment.

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(BAYLEY, J.: May not a warrant be good as to part of the time, and void as to the residue?)

Here no part is bad, it was a mere irregularity.

(LORD TENTERDEN, Ch. J.: Suppose a magistrate, having power by Act of Parliament to commit a party for one month, committed for two?)

It would be void for the second month, because as to that he would have had no jurisdiction. Here the magistrate had jurisdiction to commit for a reasonable time, and it does not appear on the face of the warrant that the time was unreasonable.

Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

This was an action of trespass for false imprisonment against a magistrate, who had committed the plaintiff for re-examination

† 17 R. R. 333 (5 M. & S. 314).

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for a period of fourteen days. The jury found that the commitment was *bonâ fide* and without any improper motive, but that the time for which the commitment was made was unreasonable. It was contended, on behalf of the defendant, that the form of the action was improper, that it should *have been case and not trespass. We are of opinion, however, that the action was in the proper form. A special action on the case could not have been maintained, because that must be founded upon some improper motive, which the jury in this case have negatived. And whether we consider this commitment is absolutely void from the beginning, as being for an unreasonable time, or consider it as void *pro tanto*, i.e. for so much of the time as was unreasonable, still an action of trespass would be maintainable, because every continuance of a party in custody is a new imprisonment and a new trespass. It appears, however, to us to be far the better opinion, that in a case like this, where the time is unreasonable, the commitment is void from the beginning. The duty of a magistrate is to commit for a reasonable time, and if he commits for an unreasonable time, he thereby does an act which he is not authorised by law to do. In the case of *Rex v. Gooding*,† the Judges thought that a commitment for an unreasonable time would be a void commitment. For it is stated in the report, that “they (the Judges) presumed that it must have appeared at the trial, that the time was reasonable, as otherwise he (the rescuer) ought to have been acquitted.” That goes to the very point, that a commitment for re-examination, if it be for an unreasonable time, is, therefore, wholly void. For the Judges were of opinion that the party so committed was not in lawful custody, and, therefore, that another who had aided such person in escaping from prison was not guilty of any offence against the law. For this reason, as well as for the other, (which I have already stated,) we are of opinion that trespass was in this case the proper form of action.

Rule refused.

† Page 322, *ante*.

REX v. SIR T. M. WILSON AND ANOTHER.†

(10 Barn. & Cress. 80—89; S. C. 5 Man. & Ry. 140; 8 L. J. K. B. 101.)

1829.
Nov. 18.

[80]

A tenant in fee of copyhold tenements, surrendered to the use of his will, and devised them to A. for life, remainder to B. for life, remainder to his own right heirs. The devisees disclaimed: Held, that on the death of the testator the estate descended to his heir, and that as the devisees would not come in and be admitted, he was entitled to admittance; and that, whether the disclaimer by the devisees was or was not made in furtherance of a scheme to defeat the lord's rights to fines, did not affect the question.

MANDAMUS to Sir T. M. Wilson, lord of the manor of Hampstead, and W. Lyddon, his steward of the said manor, to admit J. Walmsley to certain copyhold tenements holden of and parcel of that manor. By the recitals of the writ it appeared that in 1769 Henry Flitcroft was admitted tenant to these tenements, to hold the same to him and his heirs, at the will of the lord, according to the custom of the manor. In 1826 Flitcroft died seised of these tenements, leaving J. Walmsley his heir-at-law, according to the custom of the manor. In January, 1827, Walmsley applied to be admitted, but was refused on account of an alleged surrender by Flitcroft, to the use of his will; and of certain life and other estates alleged to have been devised in and by his will. In May, 1827, Walmsley attended at a customary court held in and for the manor, and requested the steward to admit him, and produced and tendered to the steward a disclaimer duly made and executed by J. F. and A. M. F., the only surviving devisees under the said will, whereby they disclaimed, renounced, and relinquished all right and title whatsoever to the said tenements; which disclaimer was duly presented by the homage at the same customary court, yet the steward refused to admit him (Walmsley), wherefore, &c. The return stated the admittance of Flitcroft; the surrender by him to the use of his will; and that he died seised, having first made his will, whereby he devised the said copyhold *tenements to his mother for life, with remainder after her decease to the use of his brother-in-law James Fletcher, for life, remainder to trustees

[*81]

† Cited by Lord ROMILLY, M.R. by MELLOR, J. in *Reg. v. Garland* in *Bickley v. Bickley* (1867) L. R. 4 (1870) L. R. 5 Q. B. 269, 273, 39 Eq. 216, 219, 36 L. J. Ch. 817, and L. J. Q. B. 86, 22 L. T. 160.—R. C.

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to support and preserve the contingent uses and estates therein after limited; remainder to the use of Anna Maria Fletcher for life, &c.; and the ultimate remainder to the testator's own right heirs for ever. And that by a certain indenture or deed of release, bearing date the 24th day of August, 1826, made and duly executed by and between the said J. Fletcher of the first part; the said A. M. Fletcher of the second part; and J. Walmsley, in the said writ mentioned, of the third part; the said J. Fletcher and A. M. Fletcher, for the considerations therein expressed, did demise, release, and for ever quit claim unto the said J. Walmsley and his heirs, all the copyhold messuages or tenements, lands, and other hereditaments, situate and being within and held of the said manor of Hampstead, of or to which the said testator Henry Flitcroft was seised or entitled at the time of making his said will, and also at his death, with the appurtenances, and all the estate, right, title, interest, trust, property, benefit, claim, and demand whatsoever of them the said J. Fletcher and A. M. Fletcher, and each of them, into and upon the same hereditaments, to hold the said copyhold messuages or tenements, lands, and other hereditaments thereby released or intended so to be, and every part thereof, to J. Walmsley, his heirs, and assigns, for and during all the rights and interests by or under the said will of the said H. Flitcroft, devised to or otherwise vested in the said J. Fletcher and A. M. Fletcher, or either of them. And that by a certain other indenture, bearing date 25th day of August, 1826, made and duly executed by *and between the said J. Walmsley of the first part, and A. M. Fletcher of the second part, and the said J. Fletcher of the third part, it is among other things witnessed, that in consideration of a covenant entered into by the said J. Fletcher and A. M. Fletcher to surrender all their estate and interest in certain copyhold estates of the said H. Flitcroft, and also in consideration of 2,500*l.* to the said Joseph Walmsley paid by the said J. Fletcher, the said J. Walmsley with the consent and approbation, and at the request of the said A. M. Fletcher, did thereby grant, bargain, sell, alien, and confirm unto the said J. Fletcher and his heirs, all that the remainder or reversion in fee simple, to take effect in possession upon the several deceases of the said J. Fletcher and

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A. M. Fletcher, and failure of the issue of the respective bodies of them the said J. Fletcher and A. M. Fletcher of and in the therein described lands, tenements, titles, and hereditaments in Hendon, in the county of Middlesex, and all other the manors, rectories, advowsons, messuages, or tenements, lands, titles, hereditaments, and premises whatsoever of the said H. Flitcroft in Hendon, or in any other place or elsewhere in the said county of Middlesex, to hold the said several messuages or tenements, land, titles, hereditaments, and premises, with their respective appurtenances, expectant upon the failure of issue of the said J. Fletcher, and upon the decease and failure of issue of the said A. M. Fletcher, unto and to the said J. Walmsley, his heirs and assigns for ever. And that the said copyhold tenements mentioned in the said indenture of the 24th day of August, 1826, and that the said copyhold tenements mentioned in the said indenture of the 25th day of August, 1826, are the same copyhold tenements, and not *other or different, and that they comprise the said copyhold tenements devised by the said will of the said H. Flitcroft, and first mentioned in the said writ. And that the said supposed disclaimer in the said writ mentioned, was made and executed by the said J. Fletcher and A. M. Fletcher long after the making the said two indentures or deeds of the 24th and 25th days of August, 1826, namely, on or about the 4th day of May, 1827, and that the said supposed disclaimer is colourable only and made for the purpose of defeating the lord of the said manor of the fines which would have been payable to him on the admissions of the said J. Fletcher and A. M. Fletcher respectively, to their said respective estates in the said copyhold tenements in the said writ first mentioned, according to the custom of the said manor. And that within the said manor there now is, and from time whereof the memory of man is not to the contrary, hath been a certain custom there used and approved of, that is to say, that when a customary tenant of the said manor has surrendered a customary tenement or customary tenements lying within and holden of the lord of the said manor, to the use of his will, and afterwards appointed the same by way of devise to any person or persons for life, or in tail, with remainder over to any other person or persons for life, or in tail, or in fee, such appointee or appointees

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after the death of the testator and presentment of the will, shall be admitted as tenant or tenants of the lord of the said manor in succession, according to their respective estates, rights, and interests so appointed to them respectively, and that within the said manor there is also an immemorial custom to make proclamations at the general courts baron or customary courts of the lord of the said manor, *for any person or persons having right or title to any customary tenements within and holden of the lord of the said manor, to come into court and be admitted thereto, and that upon the court rolls of the said manor there are entries of the admittance of persons having title to customary tenements by testamentary appointment after such proclamation. And that at the said general courts baron held in and for the said manor, as mentioned in the said writ, one of us, to wit, the said W. Lyddon, as steward of the said courts of the said manor, was then and there ready and willing, and offered the said J. Walmsley to admit him as tenant of the said copyhold premises devised by the said will of the said H. Flitcroft, and first mentioned in the said writ, in remainder or reversion, expectant on the respective deaths of the said J. Fletcher and A. M. Fletcher, and on failure of their issue, according to the tenor and effect of the devise contained in the said will of the said H. Flitcroft, but that the said J. Walmsley refused to accept such admission, requiring to be admitted as tenant in possession, and not otherwise. And these are the causes, &c.

[*85]

Long now contended that the return was insufficient, and that Walmsley was entitled to a peremptory *mandamus*. It is clear, that on the death of the testator the estate descended on his heir-at-law, *Roe dem. Jeffereys v. Hicks*.† The surrender to the use of the will makes no difference, for until the admittance of a surrenderee the estate remains in the surrenderor. The devisee might, indeed, have a right to come in and be *admitted, but on his neglecting to do so, the heir-at-law had a right to be admitted. Besides, a devisee may refuse to accept an estate, *Townson v. Tickell*,‡ and here there was a distinct disclaimer. This case, too, is stronger, for the heir, that being the case of a freehold

† 2 Wils. 13.

‡ 22 R. R. 291 (3 B. & Ald. 31).

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estate which vests in the devisee by the will; but a copyhold estate does not, *Smith v. Triggs*,† it can only vest by surrender and admittance. A devisee, until admittance cannot devise, and therefore he has not any estate in the tenement either legal or equitable, for an equitable interest may be devised before admittance: *Waineuright v. Elwell*.‡ The real question between the parties is, whether the lord can demand a fine from each of the devisees in respect of the estates relinquished by them, or whether he can compel the heir to pay a fine in respect of each of those estates. It is clear that he cannot, for no fine is due until after admittance: *Hobart v. Hammond*;§ and he cannot compel a surrenderee to come in and be admitted: 1 Watk. 208, *Payne v. Barker*.|| Whether he can claim it of the heir is immaterial to the question before the Court, inasmuch as he only desires to be admitted, the amount of fine to be paid must be determined afterwards: *Rex v. The Lord of the Manor of Hendon*.¶ The custom set out in the return does not in any way affect the question. It may be very true, that devisees have frequently come in and been admitted, they have a right so to do if they wish to be admitted; but the lord has no power to compel them to come in, and the lord has no right to take into consideration the reasons which induce them not to come *in. If they refuse, the heir has a right to come in, and as the rights of the copyholder and duties of the lord are reciprocal, the former is entitled to a peremptory *mandamus* to compel the lord to admit him.

[*86]

Comyn, contra :

The lord of the manor is bound to see that the right person is admitted tenant of the copyhold tenements in question. He has offered to admit the claimant as tenant in remainder or reversion, expectant on the determination of the preceding estates created by the will of Flitcroft the surrenderor; and he was not entitled to be admitted tenant in possession, for the estate did not descend to him as heir-at-law. His title as heir was intercepted by the devise to J. F. and A. M. F. The present application is made

† 1 Str. 484.

‡ 1 Madd. 627.

§ 4 Co. Rep. 28.

|| Bridg. 23.

¶ 1 R. R. 527 (2 T. R. 484).

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in furtherance of an attempt to defraud the lord of his fines. The devisees have not rejected the estate devised to them, but have accepted it, and have dealt with it as their own, and conveyed it to the heir for a valuable consideration.

(BAYLEY, J.: The copyhold estate remains in the surrenderor and his heirs, until the surrenderee comes in and is admitted. The devisees, therefore, never had the estate.)

The *mandamus* does not aver that the estate descended to the applicant Walmsley.

(BAYLEY, J.: It states that Flitcroft died seised, and that Walmsley is his heir-at-law according to the custom of the manor, upon that the law says that the estate descended to him.)

LORD TENTERDEN, Ch. J. :

[*87] By the common law a copyhold estate in fee, after surrender, remains in the surrenderor and his heirs until the surrenderee comes in *and is admitted. Here the devisees were the surrenderees, and on the death of the testator the estate descended to his heir, subject to the right of the devisees to be admitted. When they declared that they would not come in, the obstruction that stood in the way of the present right of the heir was removed. If the effect of the deeds set out in the return is to give the lord a right to fines of which the parties are seeking to deprive him, his remedy must be sought in another manner. In this proceeding we can only look at the legal right of the heir. He has the legal estate, and a right to be admitted to it. A peremptory *mandamus* must therefore be awarded.

BAYLEY, J. :

In a court of law we can only consider the legal rights of the parties. Now the person having the legal estate in a copyhold tenement has a right to be admitted. The estate in this case remained in the testator notwithstanding the surrender to the use of his will, and on his death descended to the heir who claims admittance, not on the ground of a distant reversion, but of the immediate legal estate which has descended to him. It was formerly doubted, whether a person claiming as heir could have a *mandamus* to be admitted because he had a complete title

without; but in *Rex v. The Brewers' Company*,† it was decided that he might. There can be no doubt in this case, that the legal estate is in the heir of the testator, and that he therefore has a right to be admitted. The return, consequently, is insufficient.

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LITLEDALE, J.:

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The question before the Court is not affected by the lord's right to a fine. We have only to consider in whom the legal estate is. It is suggested by the return, that the course pursued is in furtherance of a scheme to defeat the lord's right. If that be so, no doubt the law will provide a remedy. At present we have nothing to do with that, and it is clear that the heir of the testator has the legal estate, and, therefore, a right to be admitted. A surrender was made by Fliteroft to the use of his will, if he had not made a will nobody could doubt that the estate would have descended to the heir. Here, however, a will was made, and certain life estates were given, but the devisees did not accept them; the case is, therefore, the same as if no will had been made. According to the custom of some manors, wills are of no avail, unless presented within a certain time. This will was, I think, equally inoperative, as the devisees refused to take the estate, and the heir is entitled just as if no will had been made.

PARKE, J.:

I am of the same opinion. The question lies in the smallest possible compass. It depends on principles long settled, and never hitherto disputed. It is clear that a copyhold estate remains in the surrenderor, until the admittance of the surrenderee. It is clear, also, that in this case the estate descended to the heir-at-law of the surrenderor. Even if there had been no disclaimer, he would have been entitled to admittance, but there is a distinct disclaimer. The custom set out in the return does not affect the question, it does not amount to a custom that devisees *must* come in, and be admitted. If, *as suggested, the lord is cheated of his fines, he may have a remedy elsewhere. A peremptory *mandamus* must, therefore, be awarded.

[*89]

Peremptory mandamus.

† 27 R. R. 318 (3 B. & C. 172).

1829.
Nov. 16.

CLAY, ASSIGNEE, &C. OF S. MALLEYS, A BANKRUPT,
v. HARRISON.

[99]

(10 Barn. & Cress. 99—106; S. C. 5 Man. & Ry. 17; 8 L. J. K. B. 90;
Lloyd & Welsby, 104.)

A., in England, contracted with B. at Petersburg to send him a cargo of deals, to be paid for by a bill at three months, which he duly accepted. The deals were shipped, and A. effected an insurance. The ship was stranded on the voyage, near Elsinore, and the deals were saved, but so much injured as not to be worth sending for. A., on hearing of the accident, gave the underwriters notice of abandonment the day before the bill became due, which they refused to accept. B.'s agent stopped the goods *in transitu* at Elsinore. A. having become insolvent: Held, that his assignee, under a commission of bankrupt afterwards issued against him, could not recover on the policy, inasmuch as A., after the stoppage *in transitu*, had not any insurable interest.

ASSUMPSIT on two policies of insurance at and from Saint Petersburg to Hull, on a cargo of deals by the ship *Providence*; the interest was laid in the bankrupt S. Malleys. At the trial before Bayley, J. at the Spring Assizes for York, 1828, a verdict was found for the plaintiff for 200*l.*, subject to the opinion of this Court on the following case:

[*100] Mr. Simeon Malleys, a merchant at Hull, on the 20th of January, 1825, entered into the following contract *with one George Goodwin on the part of Hubbard & Co: "Sold Mr. Simeon Malleys, Hull, on behalf and for account of Messrs. John Hubbard & Co. London, two cargoes of deals, deliverable in June and July; say two cargoes to consist of 10,000 and 12,000 each, Petersburg standard, or thereabouts, best 3-inch deals, averaging about twenty feet in length, of which 1,000 each cargo to be white wood, and the remainder red wood, at the price of 5*l.* 15*s.* per Petersburg standard hundred for the red, and 4*l.* 10*s.* per Petersburg standard hundred for the white wood, free on board, with deal ends for broken stowage in the usual proportion. Payment by the buyer's acceptance at three months from date of shipment on receipt of invoice and bill of lading. The ships to be addressed to Mr. Stephen Morgan, St. Petersburg. Signed GEORGE GOODWIN, Hull, January 26th, 1825." Stephen Morgan and Hubbard & Co. are the same persons. On the 17th of August, 1825, Malleys chartered and

sent out, addressed to Hubbard & Co. at St. Petersburg, the ship *Providence*, whereof was master John Younger, for the purpose of bringing the said deals to Hull. On the 8th of October, 1825, Hubbard & Co. shipped the deals on board the *Providence* for Hull, and signed an invoice and bills of lading thereof indorsed in blank, which invoice, and one of which bills of lading, Malleys received in November, 1825, and immediately on the receipt thereof accepted a bill for 92*l.* 2*s.* 6*d.* the amount of the invoice, which bill became due on the 24th of January, 1826. On the 7th day of September, 1825, the defendant subscribed a policy of insurance on the deals by the *Providence* to Malleys for 100*l.*, and on the 15th of October he signed another policy on the deals for 100*l.*, upon which two policies the action was brought. The *Providence* proceeded on her *voyage, and on the 5th day of January, 1826, was stranded and wrecked off Felskage, near Elsinore. The insured cargo (with the exception of forty or fifty deals) was saved, but so much damaged that the Captain (Younger) did not think it worth sending out a ship for. The average time of passage from Elsinore to Hull is ten days. Malley's agent first heard of the loss on the 23rd day of January, 1826, and on that day gave the following notice to the defendant: "SIR,—Observing by Lloyd's list a copy of a letter dated Elsinore, 10th of January, saying the *Providence*, Captain Younger, was stranded at or near Pratoe, I am, therefore, directed by the assured to abandon to you all his right and interest in the said vessel, so far as concerns your subscription of 200*l.* on policies of insurance effected by me upon her dated the 7th of September and 15th of October, 1825, from Saint Petersburg to Hull; and I hereby call upon you for the payment of the same as a total loss. I am, SIR, your most obedient servant, S. MALLEYS, jun." This notice was returned by the defendant, as not being warranted. Malleys was insolvent on the 23rd of January, 1826, and on the 24th of January, 1826, the bill accepted by Malleys in November 1825, was duly presented for payment and dishonoured. On the same day Hubbard & Co. wrote their agents at Elsinore with instructions to take possession of the cargo for them as being their property. On the 2nd day of February, 1826, Malleys' agent sent the following notice to the defendant: "SIR,—I beg

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leave to inform you that a letter has been received from Captain Younger, stating the loss of the *Providence* at Felskage on the 5th of January last ; I am, therefore, directed by the assured to abandon to you all his right and interest in the said vessel, so far as concerns *your subscription of 200*l.* on policies of insurance effected by me upon her, dated the 7th of September and 15th of October, 1825, from Saint Petersburg to Hull, and I hereby call upon you for the payment of the same as a total loss." On receipt of both notices the defendant said, he would only accept them if Malleys could put him in possession of the goods saved. On the 4th day of February, 1826, the defendant received the following notice from the agent of Hubbard & Co. : " Sir,—I am directed by Mr. Stephen Morgan of Saint Petersburg, and Messrs. John Hubbard & Co. London, to give you notice not to pay the loss on deals per *Providence*, Captain Younger, from Petersburg, otherwise than to their order, to whom the interest on board the vessel solely belongs." On the 3rd of March, 1826, the agent of Hubbard & Co. at Elsinore received from them one of the bills of lading, which was to order, and indorsed in blank, and which had been sent out by them on the 21st of February, 1826, and thereupon applied to the agent of the ship, who agreed to deliver the cargo ; but no further possession was taken until a public sale was fixed upon, which took place on the 22nd of May, 1826, the net proceeds of which, 271*l.* 7*s.* 10*d.*, had been received by Hubbard & Co. An action was commenced by Hubbard & Co. against Malleys in Easter Term, 7th of Geo. IV., on the bill of exchange accepted by him, and notice of trial was given for the first sittings in Trinity Term, but the record was afterwards withdrawn. Malleys became bankrupt on the 23rd of May, 1826. There was a valid trading, petitioning creditor's debt, and act of bankruptcy, and the plaintiff was duly appointed the sole assignee of the bankrupt's estate. The bill of exchange accepted by Malleys still remains in the possession of Hubbard & Co., but has *not been proved on Malleys' estate. The question for the opinion of this Court was, whether the plaintiff, as assignee of the estate and effects of S. Malleys, was entitled upon these facts to recover the sum of 200*l.* on the two policies ? If the Court should be of opinion that the plaintiff, as such assignee, was entitled to recover

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the said sum of 200*l.* the verdict was to stand. If the Court should be of a contrary opinion, then a nonsuit was to be entered.

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Patteson, for the plaintiff:

There are three grounds on which the plaintiff is entitled to judgment: first, without regard to the question of stoppage *in transitu*, there was a complete total loss as between the underwriters and the assured, before any proceeding to stop *in transitu* took place, and at a time when the bankrupt and no one else was interested in the goods: secondly, there could not be any stoppage *in transitu* at the time when it was attempted, for two reasons, viz. that before that time a complete change of property had taken place, and the goods had become vested in the underwriters; or if not, still under the circumstances, the voyage had terminated before the stoppage was made, and so the right of stoppage was gone: thirdly, stoppage *in transitu* does not destroy the contract, but only revests a lien; the property in the goods remains in the buyer, and he has an insurable interest. The dates are material to the first point. By the contract, the bankrupt was to pay for the goods by bill. That was duly accepted, and became due on the 24th of January, 1826. The loss was on the 5th of January, and the news of it arrived on the 23rd, and notice of abandonment was given the same day, before the bill became due, and before any attempt *was made to stop *in transitu*. [*104]

(LORD TENTERDEN, Ch. J. : The effect of the stoppage is the only question.

BAYLEY, J. : Does an abandonment vest the property ?)

If the underwriters had accepted the abandonment, the property would have vested so as to oust the right of stoppage. Now, they ought to have accepted it, and therefore as to the plaintiffs, they must be considered in the same situation as if they had actually done so. Again, the voyage in fact ended where the ship was stranded, and the transitus of the goods ended at the place where they were landed and accepted by the bankrupt. The law, as laid down by Lord KENYON in *Holst v. Pownall*,† on this point

† 1 Esp. 240; see 1 R. R. 427, 428.

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was much qualified by the decision of this Court, in *Foster v. Frampton*,† where it was held that if goods are sent to be delivered at a particular place, and the consignee takes possession before they arrive, the transitus is thereby ended.

(LORD TENTERDEN, Ch. J.: What act of acceptance did the bankrupt do in this case?)

None, certainly, except the abandonment; and if that was not sufficient, the plaintiffs must rely on the third point, viz. that the stoppage *in transitu* does not rescind the contract *ab initio*, but only reverts a lien. In *Hodgson v. Loy*,‡ Lord KENYON said, that “the right of the vendor to stop *in transitu* was a kind of equitable lien, adopted by the law for the purposes of substantial justice, and that it did not proceed on the ground of rescinding the contract.” And in *Lickbarrow v. Mason*§ BULLER, J. says, that the right to stop *in transitu* is not founded in property, but necessarily supposes the property to be in some other person. By the common law the property in goods passes by the sale; if payment *is to be made immediately, the vendor has a right to hold them until the payment is made; but if credit is given he cannot do so, *Bloxam v. Sanders*.||

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(BAYLEY, J.: Does not the vendor by stopping *in transitu* abandon all rights that he had against the purchaser?)

No; for he may afterwards sue him for goods bargained and sold: *Kymer v. Suvercropp*;¶ the assured, therefore, had an insurable interest which he might abandon. After the bankruptcy, the assignees had a right to pay the money and claim the goods, notwithstanding the stoppage *in transitu*: the effect of that proceeding was merely to place the vendor in the same situation as if the goods had always remained in his possession.

(LITLEDALE, J.: According to *Langfort v. Tiler*,†† the vendor may resell goods if they are not duly paid for).

† 30 R. R. 255 (6 B. & C. 107).

400, 31 L. J. Ex. 92.]

‡ 4 R. R. 483 (7 T. R. 440).

|| 28 R. R. 519 (4 B. & C. 941).

§ 6 East, 24, n. [Overruled, *L. & N.*

¶ 10 R. R. 646 (1 Camp. 109).

W. Ry. Co. v. Bartlett (1861) 7 H. & N.

†† Salk. 113.

Pollock, contra :

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In this case there was no actual total loss, otherwise no question as to stoppage *in transitu* could have arisen. That right continues until the arrival of the goods at the intended place of delivery ; the mere accident of the voyage being interrupted or put an end to by the stranding of the vessel could not alter the vendor's rights. As to the main question, it was expressly held in *Litt v. Cowley*,† that by a stoppage *in transitu* the contract was rescinded, and that the goods having been delivered by the carrier to the consignee after notice to stop them, the vendor might maintain trover against the assignees of the consignee to whose possession the goods had come. So, also, the case of the *Constantia*‡ appears to have proceeded on the *right of the consignor to rescind the contract by stopping goods *in transitu*, in the event of the insolvency of the consignee.

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Cur. adv. vult.

The judgment of the COURT was now delivered by

LORD TENTERDEN, Ch. J. :

The question in this case was, whether the bankrupt had an interest in the goods insured at the time of the loss ? and that depended on the effect which is to be given to the stoppage *in transitu*. It was argued on the part of the defendant that its effect was to rescind the contract, and to revest the property in the original owners ; on the part of the plaintiffs that it only restored to the owners a right of possession, and placed them in the same situation as if they had not parted with the goods. There does not appear to be any case in which this point has been expressly decided.§ But we are of opinion that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage *in transitu*, had no property in the goods insured ; and, therefore, this action cannot be supported.||

Judgment for defendant.

† 17 R. R. 482 (7 Taunt. 169).

‡ 6 C. Rob. 321, cited in Abbott on Shipping, 371.

§ On this point the modern authorities are to the effect that the contract is not rescinded. See *Page v. Cowasjee* (1866) L. R. 1 P. C. 127, 145 ; *Phelps*

v. *Comber* (Adm. 1885) 29 Ch. Div. 813, per COTTON, L.J., p. 821, 54 L. J. Ch. 1017, 1021 ; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 48.—R. C.

|| It appears from the special case, that by the contract between the

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(10 Barn. & Cress. 107—109; S. C. 5 Man. & Ry. 85; 8 L. J. K. B. 109.)

By a Judge's order a cause was referred to an arbitrator, so as he should make his award in writing on or before the 1st day of July then next, or on or before such further or ulterior day as he should appoint in writing, under his hand, to be indorsed on that order, and the Court of King's Bench or a Judge thereof should order. The arbitrator, by indorsement on the order, enlarged the time; but at the time when he made his award no Judge's order had been obtained ratifying that enlargement: Held, that the arbitrator had no authority, and that the award was bad.†

ALL matters in difference in this cause were, by a Judge's order, dated the 19th June, 1822, referred to S. B., so as he should make his award in writing on or before the first day of July then next, or on or before such further or ulterior day as he should appoint in writing under his hand, to be indorsed on that order, and the Court of King's Bench, or a Judge thereof, should order. All the costs were to abide the event of the award. The arbitrator, by indorsement on the order, dated the 29th of June, 1822, enlarged the time until the 6th of November then next. By a second indorsement, dated the 6th November, 1822, he further enlarged the time until the 23rd of January then next. By a third indorsement, dated the 23rd of January, 1823, he

bankrupt and the vendors the latter were to supply a cargo of timber. There was no bargain for any specific ascertained chattel, but the vendors were at liberty to supply any timber answering the description of that ordered; and, consequently, no property passed till the cargo of timber was appropriated by the vendors to the vendee, by the delivery on board the ship. The subsequent stoppage *in transitu*, supposing it had only the effect of revesting the possession in the vendors, and placing them in the same situation as if they had not parted with the goods, destroyed the effect of that delivery, which was the only circumstance which vested the property in the vendee; and, consequently, the property revested

in the vendors. They then were exactly in the same condition as if the goods had always remained in their warehouses; and in that case the bankrupt would have had no interest in the goods: his rights, if any, would have rested in contract merely.

† But it has been held that under the power of s. 15 of the C. L. P. Act, 1854 (substantially comprised in s. 9 of the Arbitration Act, 1889), an order of the Court for enlarging the time made after the making of the award, the order has the effect of ratifying the act of the arbitrator. *Lord v. Lee* (1868) L. R. 3 Q. B. 404, 410, 9 B. & S. 269, 37 L. J. Q. B. 121.—R. C.

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further enlarged the time until the 16th of April then next. The last meeting before the arbitrator was on the 7th of April, 1823. By a fourth indorsement, dated 16th of April, 1823, he further enlarged the time until the time until the first of June, 1823. No Judge's order was obtained in respect of any of these enlargements. The award was dated the 31st of May, 1823, and ordered the defendant to pay the sum of 11*l.* 6*s.* 7*d.* in full satisfaction of all demands. The award recited the order of reference, but did not recite any of the enlargements. The plaintiff proceeded to make the Judge's order a rule of Court, and the several indorsements were made a part of the rule. The plaintiff then taxed his costs, and demanded the sum awarded and the taxed costs; and, upon a refusal to pay, he moved for an attachment.

Barstow now shewed cause :

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The award was not duly made, the enlargement of the time not being authorized by the terms of the order of reference. The arbitrator was to make his award within a limited time, or such further time as he the arbitrator should appoint and a Judge should order. A Judge's order, therefore, was essential to authorize the arbitrator to make an award after the day mentioned in the first order had passed. In *Reid v. Fryatt*† the terms of the order of reference were the same. There a Judge's order was obtained after the time limited for making the award, but before the award was made, and that was held to be sufficient; but it was assumed that such an order was necessary at some time before the award was made. Here no order whatever was obtained. It will be said that the defendant has waived this objection, by attending before the arbitrator, and *Lawrence v. Hodgson*‡ will be relied on; but it does not appear here that the defendant knew there was no proper enlargement. Besides, there was no meeting after the last enlargement. On the 31st of May, therefore, when the arbitrator made his award, he had no authority : *Dickins v. Jarvis*,§ *George v. Loualey*,|| *Davis v. Vass*,¶

† 1 M. & S. 1.

|| 9 R. R. 366 (8 East, 13).

‡ 30 R. R. 754 (1 Younge & J. 16).

¶ 15 East, 97.

§ 5 B. & C. 528.

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Wohlenberg v. Lageman,† and *Halden v. Glasscock*.‡ Power to enlarge was not given to the arbitrator alone.

Hutchinson, contra :

[*109] It is not competent to the defendant to make the objection. He has admitted, by attending before the arbitrator, that the latter might act *by an enlargement made by himself alone, *Lawrence v. Hodgson*.§ But, independently of this, as the rule of Court embodied all the enlargements, the Court will presume that sufficient evidence was then laid before them of the enlargements having been duly made, as the defendant does not swear that no Judge's order was made. The Court will presume any thing against such an objection, and according to BAYLEY, J., in *Dickins v. Jarvis*,|| will presume it was not made a rule of Court without sufficient evidence of proper enlargement.

BAYLEY, J. :

The objection must prevail. Assuming the defendant waived the objection by attending before the arbitrator, still there is no waiver so far as the last enlargement was concerned. The arbitrator had no authority, therefore, when the award was made. We cannot presume that Judge's orders were obtained merely because the rule was drawn up. If there were orders then produced, that would appear on the face of the rule, which in that case would be drawn up "on reading" those orders as well as enlargement.

LITTLEDALE and PARKE, JJ. concurred.*¶

Rule discharged.

† 16 R. R. 616 (6 Taunt. 251).

|| 5 B. & C. 528.

‡ 5 B. & C. 390.

*¶ Lord Tenterden, Ch. J. was

§ 30 R. R. 754 (1 Younge & J. 16).

absent from indisposition.

R. C. PEASE AND OTHERS *v.* JONATHAN HIRST
AND OTHERS.†

1829.
Nov. 24.

(10 Barn. & Cress. 122—128; S. C. 5 Man. & Ry. 88; 8 L. J. K. B. 94;
Lloyd & Welsby, 81.)

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A. wishing to obtain credit with his bankers, in 1817 prevailed upon three persons to join him in a promissory note, whereby they jointly and severally promised to pay the bankers or order 300*l.* The bankers gave A. credit in his pass-book for 300*l.* on account of the note, and charged him with interest for the same yearly. Upon two of the partners retiring from the banking-house a balance was struck between the old and new firm, and the promissory note was delivered to the new firm, but not indorsed to them. A. at one time had in the hands of his bankers a balance exceeding the amount of the note. He paid interest to the banking-house annually.

Held, first, that the note being payable to the five members of the banking-house or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the banking-house.

Secondly, that an action on the note (the same not having been indorsed) was properly brought in the name of the payees of the note.

Thirdly, that the note was not discharged by reason of A. at one time having in the hands of the bankers a balance exceeding in amount the sum secured by the note.

Fourthly, that the payment of interest within six years by A. on the note was evidence of an acknowledgment by all the joint makers of the note, so as to take the case out of the Statute of Limitations.

THIS was an action on a promissory note, bearing date the 6th of January, 1817, whereby the defendants jointly and severally promised to pay on demand Messrs. Pease, Harrison, & Co., or order, 300*l.*, with lawful interest for the same, value received. Plea, general issue and Statute of Limitations. At the trial before Bayley, J. at the Summer Assizes for the county of York, 1828, the following appeared to be the facts of the case: The plaintiffs and Robert Harrison, in January, 1817, carried on business at Kingston-upon-Hull under the firm of Pease, Harrison, & Co. The defendant, Jonathan Hirst, had for some years before kept an account with them, as his bankers; and at that time, in order to obtain credit with them, he prevailed with the other defendants to join him in the promissory note in

† See now the Partnership Act, Mercantile Law Amendment Act, 1890 (53 & 54 Vict. c. 39), s. 18, 1856. The enactments agree with which replaces the 4th section of the the principle of the decision.—R. C.

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question. The note was deposited with the bankers, and they gave him credit for 300*l.* on account *of it in his pass-book, and charged him interest for the same yearly. In November, 1820, R. C. Pease and H. Pease retired from the banking-house. A balance was then struck between the old and new firm, and the account of Jonathan Hirst was transferred in the books from the old to the new firm. The promissory note was handed over to the new firm, but was not indorsed to them. In December, 1821, Harrison died. The account was transferred to the new firm as on the former occasion. The other two members of the old firm, Lock and Watson, continued the business together, with two new partners, up to the time when this action was brought; and as the new partners entered, the account of Jonathan Hirst was transferred to the new firm, and the promissory note handed over to them. Hirst had at one time in his bankers' hands a balance in his favour of near 700*l.*; but it did not appear that that was a money balance. He was charged by the successive firms with interest upon the promissory note down to the year 1824, and allowed the same in account with the bankers. It was contended, on the part of those defendants who were mere sureties for Jonathan Hirst, that as on every change of the firm a balance was struck, and a new account opened, the note became one of the securities of the new firm; that the defendants, therefore, were liable upon the note to the new firm, and could not be sued by the partners who had retired from it. Secondly, that as against the sureties there was no acknowledgment of a debt within six years, the payment of interest having been made by Jonathan Hirst, not to the original payees, but to those persons who were members of the firm at the time of such payment. The jury, under the direction of the *learned Judge, found a verdict for the plaintiffs, but liberty was reserved to the defendants to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

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The *Attorney-General* now shewed cause :

The payees of the note, if alive, or the survivors of them, who have the legal interest in the note, are the persons entitled to sue upon it. The note cannot be considered as having been

discharged by reason of Jonathan Hirst's having in the hands of the bankers a balance equal in amount to the sum for which the note was given. It does not appear that that was a cash balance in his favour; but assuming that it was, the bankers were not bound to apply that balance in discharge of the debt due to them on the promissory note. That note was intended by all parties to be a continuing security for all advances made from time to time by the bankers. The debtor, if he had intended that the note should be discharged by such balance, should have made a specific appropriation: *Brooke v. Enderby*.† The payment of interest by one of several joint promisors is to be considered in law a payment by all: it operates as an acknowledgment of the debt by all: *Burleigh v. Stott*.‡

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F. Pollock and Alderson, contra :

The note was given to the persons who constituted the banking-house in January, 1817. By the change in the firm the responsibility of the maker ceased. The note became the property of the successive members of the new firm. It was treated as such by the bankers as well as *by Jonathan Hirst. The members of the banking-house (in whom the property now is) are the persons entitled to sue. Three of the defendants are mere sureties; they, in effect, agreed in January, 1817, to guaranty to certain individuals (then constituting the firm of Pease & Co.) the payment of any sum (not exceeding 300*l.*) advanced to Jonathan Hirst.

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(BAYLEY, J. : They do not appear on the face of the instrument to be sureties.)

The form of the instrument cannot vary the nature of the contract. Then this being a note payable *instantly*, they were bound (in favour of the sureties) to apply the first available balance in their hands belonging to Jonathan Hirst in discharge of the note: *Clayton's case*,§ *Bodenham v. Purchas*,|| *Simson v. Ingham*.¶ Then as to the Statute of Limitations, the payment

† 22 R. R. 653 (2 Brod. & Bing. 70).

|| 20 R. R. 342 (2 B. & Ald. 39).

‡ 32 R. R. 334 (8 B. & C. 36).

¶ 26 R. R. 273 (2 B. & C. 65).

§ 15 R. R. 161 (1 Mer. 572).

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of interest by Jonathan Hirst is not any acknowledgment of a debt due to the present plaintiffs by the three defendants, who are mere sureties. It was paid by Jonathan Hirst on account of the several debts due from him to the banking-house, and it was paid not to the present plaintiffs but to the persons who, from time to time, were members of the banking-house.

BAYLEY, J. :†

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It seems to me that the plaintiffs are entitled to retain their verdict. One objection is, that this being a note in which three of the four defendants joined as sureties to a banking-house (in which the plaintiffs and Harrison were partners), the liability of the defendants has ceased by the subsequent change in the firm. But a surety bond or instrument may be so framed as to comprehend future as well as present partners. *Here by the form of the instrument none of the parties have placed themselves in the condition of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking-house, for the note is made payable to them or order. It was evidently intended that it should continue from time to time to be an available security to such persons as afterwards constituted the members of the house. Another objection is, that this note was discharged by a balance belonging to Jonathan Hirst, which afterwards came into the hands of the banker. It was contended that the plaintiffs are bound to consider the debt due on the note as paid and wiped off by that balance. It does not appear that that was a cash balance; but if it had been, the bankers would not have been bound to apply it in payment of the note. It would be directly contrary to the intention for which the note was given that it should be paid off by the first money of Jonathan Hirst which came to the hands of the bankers. If the persons who were in substance, though not in form, sureties, had desired the bankers so to apply the balance, they, perhaps, would have been bound so to apply it. Then it is said that the action is not properly brought in the names of the plaintiffs. It appears that when a change in the firm of the banking-house took place, the

† Lord Tenterden, Ch. J. was absent from indisposition.

note was transferred in account from the old to the new firm, and interest was paid by Jonathan Hirst from time to time to the different firms as if it was a debt due to the persons successively constituting that firm. It is said that the note was considered by all parties to be for the benefit of the new house; and, therefore, that the persons who are now partners in the banking-house must sue. It seems to *me that the action has been rightly brought in the names of the members of the firm to whom the note was given. If the note had been indorsed to the new firms, then the action must have been brought in the names of the indorsees; but not having been so indorsed, the action is properly brought in the name of the original payees for the benefit of the parties interested. Then it is said, that as to the three defendants who are mere sureties, there was no acknowledgment of the debt within the six years. Here interest on the debt has been paid within that time by one of the four persons jointly liable. That takes the case out of the statute as to all.

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LITTLEDALE, J. :

I am of the same opinion. The payment of interest by Jonathan Hirst, one of the joint promisors, takes the case out of the Statute of Limitations as to all. Then as to the change of the members of the banking-house, although all the securities belonging to the old firm were handed over to the new firm, still the persons entitled to the legal interest in those securities must sue upon them. Suppose that a bond instead of a note had been given as a security for advances to the members of the firm as they then existed, as well as to any new member of which it might afterwards be composed, the proper persons to sue would be the surviving obligees.

The next question is, has the note been paid off by the bankers having struck a balance which was in favour of J. Hirst. It was evidently not intended by the parties to consider it as satisfied as soon as there should be a balance of 300*l.* in the hands of the bankers. It was intended to be a continuing security for advances to be made from time to time. It is made payable to order on demand. There clearly, therefore, was no legal *obligation in the bankers to appropriate that balance to

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the discharge of the note; and there having been no appropriation by the debtor, I think the debt cannot be considered as discharged.†

Rule discharged.

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Nov. 25.
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DICKINSON v. VALPY.†

(10 Barn. & Cress. 128—144; S. C. 5 Man. & Ry. 126; 8 L. J. K. B. 51; Lloyd & Welsby, 6.)

In an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an indorsee for value, sought to charge the defendant as a member of that company, it was proved that the bill had been drawn and accepted by order of the directors of the company. It was proved further, that the company had entered into a contract for the purchase of mines, taken a counting-house in London, engaged clerks, and also an agent to reside in the country, and had worked some of the mines; that the defendant having applied to the secretary of the company for shares, some were appropriated to him; that he paid an instalment of 15*l.* per share; that he attended at the counting-house of the company, and there signed some deed, and afterwards attended a general meeting of the shareholders: Held, that assuming this to be sufficient evidence of the defendant's being a partner in the company, it was incumbent on the plaintiff to prove that the directors of that company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff not having produced the deed of co-partnership, nor given any evidence to shew that it was necessary, for the purpose of carrying on the business of that mining company, or usual for other mining companies to draw or accept bills of exchange, there was no evidence to go to the jury of such an authority to draw or accept any bills, and still less to draw or accept bills in this form, which in effect were promissory notes.

THIS was an action by the plaintiff as indorsee of the following instrument :

£300 Os. Od.

“REDRUTH, March 30th, 1826.

“Two months after date, pay to the order of Mr. Thomas Teague, three hundred pounds, value received as advised.

“For the Cornwall and Devonshire
“Mining Company.

“ROWLAND WILKS.”

“To the Cornwall and Devonshire

“Mining Company,

“Lombard Street, London.”

† PARKE, J. having been counsel in the cause gave no opinion.

‡ Cp. *Bull v. Morrell* (1840) 12 A. & E. 745; *Bateman v. Mid-Wales Ry. Co.* (1866) L. R. 1 C. P. 499;

Peruvian Ry. Co. v. Thames & Mersey Marine Ins. Co. (1867) L. R. 2 Ch. 617, the latter a case under the Companies Act, 1862.—F. P.

The first four counts of the declaration described the instrument as a bill of exchange, charging the defendant *as drawer and acceptor; and the fifth described it as a promissory note. Plea, general issue. At the trial before Burrough, J., at the Summer Assizes for the county of Somerset, 1827, the following appeared to be the facts of the case. The bill was indorsed for value by one Teague to the plaintiff; and having been dishonoured when due, the plaintiff now claimed to recover the amount from the defendant as a member of the Cornwall and Devonshire Mining Company. In order to shew that he was a partner in that company, the plaintiff proved that in the early part of the year 1825 certain persons associated themselves together for the forming of a company, for the purpose of working mines in Devonshire and Cornwall. On the 7th of April in that year a meeting of those persons was held, at which resolutions were passed that there should be a company formed, with a capital of one million, in shares of 50*l.* each; that mines in Cornwall should be purchased, and that there should be directors, a treasurer, a secretary, and other officers, and bankers to the company. These resolutions were advertised in the newspapers. A counting-house was taken in London for transacting the business of the company, clerks were engaged, a contract was entered into for the purchase of mines in Cornwall, an agent was employed to reside there, and some of the mines were actually worked. The defendant, on the 6th day of April, applied to the secretary of the company for thirty shares, and ten were appropriated to him. Upon these shares, he paid to the bankers of the company an instalment of 5*l.* per share, and received in return certain printed receipts, called scrip receipts. He afterwards took these scrip receipts to the counting-house, where there was a meeting of the directors, and paid a *second instalment of 10*l.* per share, and signed a deed. In July, 1826, he attended a general meeting of the shareholders. The defendant offered evidence of what he said at that meeting, to shew that he went to it for the purpose of declining any interest in the company, and not for the purpose of taking any part in the direction of its affairs. The learned Judge rejected this evidence. The defendant then tendered evidence to shew that the original

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projectors of the company had, by false representations, induced him and other persons to become members of it. The learned Judge was of opinion that fraud in the concoction of the concern, though practised on the defendant, was no answer to this action by a mere stranger, and refused to receive the evidence. It appeared further that the bill was drawn and accepted in London, though dated at Redruth, in pursuance of a resolution of the directors, which was entered in the book of the company, and in discharge of a claim by Teague on the company for an advance made by him, and was afterwards allowed in account to Wilks the drawer. It was objected, first, that there was no evidence to shew that the defendant ever actually became a partner in interest, or held himself out to the world as a partner. The learned Judge was of opinion that there was sufficient proof to make the defendant liable as a partner. Secondly, assuming that the defendant was proved to be a partner, there was no proof that the directors had authority to bind the shareholders by drawing or accepting bills. The learned Judge reserved the latter point, and a verdict was found for the plaintiff for the amount of the bill. In the following Term, a rule *nisi* was obtained for entering a nonsuit upon the point reserved by the learned Judge, or for a *new trial, on the ground that the evidence tendered by the defendant had been improperly rejected, and that there was no evidence to shew that the defendant was a partner.

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C. F. Williams and Follett now shewed cause :

There was ample evidence to shew that the defendant either was an actual partner, or that he held himself out to the world as a partner in the company. First, it was proved that a partnership or company was formed for the purpose of working mines, selling the ore, and sharing the profits ; that the company had a counting-house, agents, clerks, and all the usual accompaniments of a mercantile speculation. Secondly, there was proof that the defendant was a partner in that concern. He applied for shares and they were allotted to him, he paid money towards the funds of the society, he attended at the counting-house, and also at a general meeting of shareholders, as a member of the

company, and he signed some deed. The plaintiff, a perfect stranger to the company, and the mere holder of a bill of exchange, cannot reasonably be expected to produce the deed of co-partnership between the defendant and the other members of the company. Besides, parol evidence is sufficient to shew that a person is an actual partner with another, although there may be a deed of partnership: *Alderson v. Clay*,† *Holmes v. Higgins*.‡ * * *

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The *Attorney-General* (and *Crowder* was with him), in support of the rule, was desired by the COURT to confine himself to the question, whether the directors had authority to bind the other members of the company by drawing and accepting bills? It is clear that the directors could not bind the other members of the company by drawing and accepting bills, without an authority from them, either express or implied. Here there was no proof of any express authority. The deed of co-partnership was not produced. The law will not imply such an authority in this case, though it does so in the case of an ordinary trading partnership. Here several persons have associated together for the purpose of working mines, and raising and selling the ore. That is not a trade, but a mode of enjoying the produce of the land. The adventurers resemble the joint occupiers of a farm, whose object is, by cultivation, to raise the produce and sell the same; and though it may be necessary to purchase many things for the purpose of cultivating the land and effecting their object, the law does not imply any authority for one of several persons jointly interested in a farm, to bind the others by bills of exchange: *Greenslade v. Dower*.§ Ship owners may *bind each other for repairs, but not by bills of exchange: *Williams v. Thomas*.||

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LORD TENTERDEN, Ch. J.:

Assuming that the defendant was proved to be a partner, and not merely to have done certain acts in contemplation of becoming a partner, it was not shewn that he, or the other members of that company, had given any authority to a certain part of that

† 18 B. R. 788 (1 Starkie, 405).

§ 31 B. R. 272 (7 B. & C. 635).

‡ 1 B. & C. 74.

|| 6 Esp. 18.

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company to bind the rest, by drawing or accepting bills of exchange. In order to shew that, the plaintiff should have gone further, and proved some express authority for that purpose, or facts from which the law would imply such authority. The deed executed by the defendant and the other partners may, perhaps, have contained a clause empowering the directors to draw and accept bills; but that was not produced. In the absence of such proof, I am of opinion that the mere circumstance of the defendant's having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern.

BAYLEY, J. :

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I am not prepared to say that there was sufficient evidence to charge the defendant either as an actual partner, or as a person who held himself out to the world as a partner. A doubt upon that point, however, would only entitle the defendant to a new trial. But in order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were *authorised to bind the other members by drawing and accepting bills. Now, upon that point, the only question which could be submitted to the jury was, whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills? or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power? There was no evidence to warrant the Judge in leaving those questions to the jury. First, there was no evidence for them that such a power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose. The directors of such a company ought to take care to have ready money to answer all demands upon them. If they have not, I cannot suppose that every person who becomes a shareholder in such a company understands that he is to be personally liable upon a bill of exchange, drawn or accepted by a director; for the effect of that would be to authorise the directors

to pledge the credit and responsibility of the individual shareholders to any extent; and if that was not the understanding of the shareholders, the directors could not have any implied authority to pledge the credit of the other members by drawing or accepting bills. The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members. I am therefore of opinion, that there was in this case no evidence of any authority conferred upon the directors by the defendant, or any other members of the company, to charge them individually, by drawing or accepting bills of exchange.

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LITLEDALE, J. :

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I think the rule must be made absolute for a nonsuit. The bill is drawn by Richard Wilks for the Cornwall and Devonshire Mining Company. It is addressed to the company, and accepted for them by John Wood, their secretary. In its form, therefore, it is very unusual. It is not a bill drawn by individuals upon others, but drawn for and accepted by a mining company. When the plaintiff, therefore, took this bill, he had notice on the face of it that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the persons who drew and accepted this bill had authority, by such acts, to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons; and it was incumbent on the plaintiff to prove at the trial that they had such authority. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the drawing and accepting of bills is necessary for the purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to shew that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company), to bind the rest by drawing or

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accepting bills. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because *it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff, in this case, to have shewn, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual; for, if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it. Besides, this is in form a bill of exchange drawn by the company upon themselves. It is, therefore, in effect, a promissory note. I think it would require more evidence to shew that the directors of such a company had power to bind the other members by promissory notes than by bills of exchange. Upon the ground, therefore, that the plaintiff, having had notice of what the nature of the bill was, ought, before he took it, to have ascertained whether the directors had authority to bind the other members of the company by drawing and accepting bills, and to have proved, affirmatively, that they had such authority, and not having given evidence to shew that it was necessary for this mining company, or usual for other similar mining companies, to draw or accept bills, and still less to accept bills in this form, I am of opinion that he is not entitled to recover.

[140] PARKE, J. :

I am also clearly of opinion that there ought to be a nonsuit or a new trial. This was an action upon a bill of exchange against the defendant as one of the drawers or acceptors. The bill was not drawn or accepted by the defendant himself; and, therefore, the plaintiff was bound to shew that the defendant, either expressly or impliedly, authorised the drawing or accepting

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of the bill of exchange; and it makes no difference in my mind, that the plaintiff was the holder for a valuable consideration, because, though he was such a holder, he was bound to make out his case, and for that purpose to shew an authority from the defendant. There is no pretence to say that there was any express authority to draw or accept this bill of exchange; and there is no pretence to say, that the drawing or accepting of this bill was subsequently ratified by the defendant; and, therefore, the plaintiff proposes to shew that there was an implied authority, and that implied authority, it is said, arises from the relation of partner.

Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. The plaintiff, therefore, must begin by shewing that the defendant stood in the situation of complete partner. He says, I can shew that; in the first place, because the defendant has represented himself to be so. And if it could have been proved that the defendant had held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement. There is, however, no reason in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff as a partner. Therefore, upon the ground of representation, he is not liable.

It is next said that he was bound, because he was, in point of fact, a partner. It is to be observed, that amongst the circumstances relied upon to shew that, was the fact of the defendant's

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attendance at some meeting of the shareholders ; but, as the learned Judge shut out the evidence of what passed at the meeting at which the defendant attended, that attendance ought not to have been used against him ; and therefore, on that ground, it seems to me there ought to be a new trial.

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But I think that, in this case, it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner ; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a *contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the mean time enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorised them (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having, in substance, given that authority). In those cases in which a plaintiff has not been induced by the defendant's representation to give credit to him, but seeks to fix him because he has really authorised the contract to be made, the plaintiff must shew that authority, and an authority upon condition not performed, is no authority at all.

For these reasons I should say a new trial ought to be granted, upon the ground that no sufficient evidence was given to shew that the defendant was a complete partner. Supposing, however, that the defendant was a complete partner, there is another question upon which this case may be decided ; that is, that, at

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all events, there was not any evidence to prove an authority in the partners in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies arising by implication from *the nature of their dealings (and it is to be observed that there was no proof of any usage to do this in such companies) to draw bills of exchange. The argument would go to this, that all persons who deal in the produce of the land which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it. If the argument was valid, it would shew that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange upon the persons to whom the produce of the land was sold. There is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of their business to draw such a bill of exchange as this; for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or promissory notes would be, that each of the partners in the concern would have the power of pledging the others, not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch as one partner might raise money to any amount by drawing bills of exchange, and, if they were passed into the hands of innocent indorsees, the partners would be liable to the full extent of their fortunes.

It appears to me, therefore, that there ought to be a nonsuit, on the ground that the alleged partners had no *authority to draw a bill of exchange of this description.

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I offer no opinion upon the question, whether the evidence that was offered of the fraudulent concoction of this company would, if received, be an answer to this action. It has been assumed in argument, with reference to this part of the case, that the plaintiff believed the defendant to be a partner; and

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undoubtedly, if the defendant, though he had been induced to enter into the partnership by fraud, had represented himself to the plaintiff as a partner, he could not avail himself of the fraud as any answer to a plaintiff whose situation had been altered in consequence of that representation. That, however, is not this case. This is a case of an alleged actual partnership, and the plaintiff must shew a partnership in order to fix the defendant, and the question is, whether, if that defendant has been induced by fraud to enter into it, it is any partnership at all, for this purpose. It is not necessary to give any opinion upon that question at present: but I conceive that it is one of considerable nicety.

Rule absolute for a nonsuit.

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DOE D. JAMES CHRISTMAS AND OTHERS v. OLIVER.†

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(10 Barn. & Cress. 181—190; S. C. 5 Man. & Ry. 202; 8 L. J. K. B. 137.)

Testator devised lands to his wife for life; remainder to all the children of his brother that should be living at the time of his wife's decease. His brother left one daughter, who married, and afterwards with her husband, during the life of testator's widow, levied a fine *come ceo* of the lands, and declared the use to A. B. After the death of the widow A. B. brought ejectment against the tenant in possession: Held, that it was maintainable; for that although the brother's daughter had only a contingent remainder during the life of the widow, and the fine could only operate by estoppel until the contingency happened, yet afterwards it operated on the estate.

EJECTMENT for the recovery of seven freehold messuages and tenements, land and gardens, with the appurtenances, situate in Belgrave Gate, in the parish of St. Margaret, in the town and borough of Leicester. At the trial before Mr. Serjeant D'Oyley, at the Summer Assizes for the county of Leicester, 1828, a verdict was found for the plaintiff by consent, on the demise of James Christmas only, subject to the opinion of this Court on the following facts:

† The same principle is applied in the case of *Sturgeon v. Wingfield* (1846) 15 M. & W. 224; 15 L. J. Ex. 212. It has been maintained in Scotch law under the description of "accretion of title," in accordance

with the maxim, *Jus superveniens auctori accrescit successori*. See *Swan v. Western Bank of Scotland* (1866) Court of Session Cases, 3rd series, vol. iv., p. 663.—R. C.

Theophilus Holmes, being seised in fee of the said tenements and premises, made his last will and testament in writing, bearing date the 29th day of September, 1784, duly executed and attested, for the purpose of passing real estates, and thereby gave and devised as follows; that is to say, “I give and devise the messuage or tenement wherein I now dwell, with the appurtenances thereto belonging, and the use of all my household goods, plate, linen, and other household furniture of every sort and kind which shall be about my said messuage or tenement at the time of my decease (except the plate), and also my messuage or tenements in Belgrave Gate, Leicester, unto my wife Christian Holmes, for and during her natural life; and from and after her decease, I give and devise the said messuage or tenement wherein I now dwell, with the appurtenances, and also my said messuages or tenements” (in the said will described, being those for the recovery of which *these actions are brought,) “with warehouses, stables, and other buildings, yards, gardens, and backsides thereunto belonging, in case I shall die without issue (but not otherwise), unto, between, and among all the children of my brother, the Reverend Mr. William Holmes, that shall be living at the time of my said wife’s decease, and to their heirs and assigns for ever.”

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The testator, Theophilus Holmes, died, seised of the premises in question, in the month of September, 1785, without issue, and without altering or revoking his said will. On his death, his widow, Christian Holmes, who afterwards intermarried with one Joseph Chamberlain, entered into possession of the tenements in question, and so continued until the time of her death, which happened in or about the month of September, 1826. The said William Holmes, mentioned in the will of the testator, had issue three children only, that is to say, James Harrman, Ann Mary, and Thomas Braegate; James and Thomas died without issue in the lifetime of the testator’s widow, Christian Chamberlain. The said Ann Mary, the daughter of the said W. Holmes, intermarried with Joseph Brooks Stephenson, and was the only child of W. Holmes, who was living in the month of March, 1814, and at the time of the death of the testator’s widow, Christian.

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On the 4th of March, 1814, and during the lifetime of the said Christian Chamberlain, by indenture duly made between the said J. B. Stephenson and Ann Mary his wife (therein described as devisee, named in the last will of the said Theophilus Holmes, then deceased,) of the first part, J. Connor gent. of the second part, Charles Waldron of the third part, and Thomas Chandless, gent., a trustee nominated and appointed by and *on the part and behalf of the said Charles Waldron, and also of the said Joseph Brooks Stephenson and Ann Mary his wife of the fourth part; the latter, in consideration of 600*l.*, granted to Charles Waldron, his executors, administrators, and assigns, for and during their natural lives and the life of the survivor, an annuity of 100*l.* to be charged upon and issuing out of the said messuages or tenements devised by the will of Theophilus Holmes, and for better securing the payment of the annuity granted, bargained, and sold unto Thomas Chandless, his executors, &c. all the said premises, *habendum*, from and immediately after the decease of Christian Holmes for the term of ninety-nine years. And then, after reciting that the said J. B. Stephenson and Ann Mary his wife did, as of Hilary Term then last, acknowledge and levy before his Majesty's justices of the Court of Common Pleas at Westminster, unto T. Chandless and his heirs, one fine *sur conusance de droit come ceo*, &c., of the said premises, by the description of seven messuages, seven gardens, and one acre of land, with the appurtenances, in the parish of St. Margaret, in the town and borough of Leicester, of which fine no uses had as yet then been declared, it was by the said indenture agreed and declared between and by the said parties, that the said fine should be and enure to and for the several uses, intents, and purposes in the said indenture expressed of and concerning the same; that is to say, in the first place, for confirming the said yearly rent-charge or annual sum of 100*l.* thereinbefore granted, and the several powers by the said indenture given, and, in the next place, to the use of T. Chandless, his executors, administrators, and assigns, for and during the said term of ninety-nine

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*years. The said last-mentioned indenture was duly executed by the parties, and a receipt for the consideration money indorsed, and a memorial of the same duly inrolled in the Court of Chancery

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according to the statute in such case made and provided. The fine referred to by the said indenture was duly levied according to the same in Hilary Term 54 Geo. III. with proclamations. On the 11th day of April, 1823, Thomas Chandless departed this life, having made a will and several codicils, and appointed Sir W. Long, Knight, and Henry Gore Chandless, executors. On the 27th of January, 1827, by indenture of that date between the said Charles Waldron of the first part, Sir W. Long, Knight, and Henry Gore Chandless, executors of Thomas Chandless, of the second part, Newbold Kinton, one of the lessors of the plaintiff, of the third part, and James Christmas, one other of the said lessors, of the fourth part, in consideration of the sum of 240*l.* expressed to be paid by Newbold Kinton to Sir W. Long and H. G. Chandless as such executors as aforesaid, and also in consideration of the further sum of 720*l.* also expressed to be paid by Newbold Kinton to Charles Waldron, they Sir W. Long, H. G. Chandless, and Charles Waldron, did, and each of them did grant, bargain, sell, assign, transfer, and set over unto N. Kinton all the said annuity or yearly sum of 100*l.* so granted for and during the lives of J. B. Stephenson and John Connor, and the life of the survivor of them, and all arrears and future growing payments thereof. And by the said indenture the said Sir W. Long and H. G. Chandless, as such executors, and for the considerations aforesaid, and of 10*s.* paid to them by the said James Christmas, did bargain, sell, assign, transfer, and set over unto the said James Christmas, his executors, *administrators, and assigns the said tenements so demised by the said indenture, bearing date the 4th day of March, 1814, to hold the same to the said James Christmas for the residue of the said term of ninety-nine years granted by the said indenture of the 4th day of March, 1814, in trust for securing the payment of the said annuity to the said Newbold Kinton. On the 4th day of June, 1827, the sum of 1,275*l.* became due and payable in respect of the said annuity, for fifty-one quarterly payments of the said annuity, and which had respectively remained unpaid for the space of forty days before the commencement of the said actions. The day of the demises laid in the declarations is the 1st day of November, 1827. The question for the opinion of the Court was,

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Whether the said Ann Mary Stephenson, who was the only child of the said William Holmes living on the 4th of March, 1814, and at the time of the death of the said Christian Holmes (afterwards Chamberlain) took a vested or contingent remainder under and by virtue of the will of the said Theophilus Holmes; and whether the fine levied by the said Mr. and Mrs. Stephenson worked any forfeiture of the estate of the latter, or transferred any interest therein?

The case was argued at the sittings in Banc after Trinity Term by

Preston for the plaintiffs, who admitted that the estate given by T. Holmes to the children of W. Holmes was contingent during the lifetime of Christian, widow of the testator; but contended that the fine levied by Mrs. Stephenson, the daughter of W. Holmes, and her husband, although it operated by estoppel only during *the life of the widow, yet after the contingency happened, operated on the estate which became vested in the daughter of W. Holmes.

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N. R. Clarke, contra, contended that the estate of Mrs. Stephenson could not be conveyed by the fine levied in the lifetime of the widow, inasmuch as a contingent remainder cannot be so conveyed; and, consequently, the estate still remained vested in Mr. and Mrs. Stephenson. The fine levied by them operated by way of estoppel only, and of that a stranger may take advantage, *Doe v. Martyn*.†

Cur. adv. vult.

BAYLEY, J.:

This case depended upon the effect of a fine levied by a contingent remainder-man in fee. Ann Mary the wife of Joseph Brooks Stephenson was entitled to an estate in fee upon the contingency of her surviving Christian, the widow of Theophilus Holmes; and she and her husband conveyed the premises to Thomas Chandless for ninety-nine years, and levied a fine to support that conveyance. Christian, the widow, died, leaving Mrs. Stephenson living, so that the contingency upon

† 32 R. R. 459 (8 B. & C. 497).

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which the limitation of the fee to Mrs. Stephenson depended, happened, and this ejectment was brought by the assignees of the executors of Thomas Chandless, in whom the term for ninety-nine years was vested. It was conceded upon the argument that the fine was binding upon Mr. and Mrs. Stephenson, and all who claimed under them by estoppel; but it was insisted that such fine operated by way of estoppel only; that it *therefore only bound parties and privies, not strangers; that the defendant, not being proved to come in under Mr. and Mrs. Stephenson, was to be deemed not a privy, but a stranger; and that as to him, the estate was to be considered as still remaining in Mr. and Mrs. Stephenson. To support this position, the defendant relied upon the latter part of the judgment delivered by me in *Doe dem. Brune v. Martyn*;† and that part of the judgment certainly countenances the defendant's argument here. The reasoning, however, in that case, is founded upon the supposition that a fine by a contingent remainder-man operates by estoppel, and by estoppel only; its operation by estoppel, which is indisputable, was sufficient for the purpose of that decision, whether it operated by estoppel only, or whether it had a further operation, was quite immaterial in that case; and the point did not there require that investigation, which the discussion in this case has made necessary. We have, therefore, given the point the further consideration it required, and are satisfied upon the authorities, that a fine by a contingent remainder-man, though it operates by estoppel, does not operate by estoppel only, but that it has an ulterior operation when the contingency happens; that the estate which then becomes vested feeds the estoppel; and that the fine operates upon that estate, as though that estate had been vested in the cognizors at the time the fine was levied.

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In *Rawlin's* case,‡ Cartwright demised land, not his, to Weston for six years; Rawlins, who owned the land, demised it to Cartwright for twenty-one years; and Cartwright re-demised it to Rawlins for ten; and it was resolved *that the lease by Cartwright, when he had nothing in the land, was good against him by conclusion; and when Rawlins re-demised to him, then was his interest bound by the conclusion; and when Cartwright

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† 32 B. R. 459 (8 B. & C. 497).

‡ 4 Co. Rep. 52.

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re-demised to Rawlins, now was Rawlins concluded also. Rawlins, indeed, is bound as privy, because he comes in under Cartwright; but the purpose for which I cite this case is, to shew that as soon as Cartwright gets the land, his interest in it is bound. In *Weale v. Lower*,† Thomas, a contingent remainder-man in fee, leased to Grills for 500 years, and levied a fine to Grills for 500 years, and died. The contingency happened, and the remainder vested in the heir of Thomas, and whether this lease was good against the heir of Thomas was the question. It was debated before HALE, Ch. J., and his opinion was, that the fine did operate at first by conclusion, and passed no interest, but bound the heir of Thomas; that the estate which came to the heir when the contingency happened fed the estoppel; and then the estate by estoppel became an estate in interest, and of the same effect as if the contingency had happened before the fine was levied; and he cited *Rawlin's* case, 4 Coke, 58, in which it was held, that if a man leased land in which he had nothing, and afterwards bought the land, such lease would be good against him by conclusion, but nothing in interest till he bought the land; but that as soon as he bought the land, it would become a lease in interest. The case was again argued before the LORD CHANCELLOR, Lord Ch. J. HALE, WILD, ELLIS, and WINDHAM, justices, and they all agreed that the fine at first enured by estoppel; but that when the remainder came to the *conusor's heir, he should claim in nature of a descent, and therefore should be bound by the estoppel; and then the estoppel was turned into an interest, and the cognizee had then an estate in the land. In *Trevivan v. Lawrence*,‡ Lord HOLT cites 39 Ass. 18, and speaks of an estoppel as running upon the land, and altering the interest of it, as creating an interest in or working upon the estate of the land, and as running with the land to whoever takes it. In *Vick v. Edwards*,§ Lord TALBOT must have considered a fine by a contingent remainder-man as having the double operation of estopping the conusors till the contingency happened, and then of passing the estate. In that case, lands were devised to A. and B. and the survivor of them, and the heirs of such survivor, in

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† Poll. 54, A.D. 1672.

§ 3 P. Wms. 372 (1735).

‡ 6 Mod. 258, Ld. Raym. 1051.

trust to sell: the master reported that they could not make a good title, because the fee would vest in neither till one died. On exceptions to the master's report, Lord TALBOT held, that a fine by the trustees would pass a good title to the purchaser by estoppel; for though the fee were in abeyance, it was certain one of the two trustees must be the survivor, and entitled to the future interest; consequently, his heirs claiming under him would be estopped by reason of the fine of the ancestor to say, *quod partes finis nihil habuerunt*, though he that levied the fine had at the time no right or title to the contingent fee. And the next day he cited *Weale v. Lower*. Now, whether Lord TALBOT were right in treating the fee as in abeyance, and the limitation to the survivor and his heirs as a contingent remainder or not, it is evident he did so consider them; and he must have had the impression that the fine would have *operated not by estoppel only, but by way of passing the estate to the purchaser, because, unless it had the latter operation as well as the former, it could not pass a good title to the purchaser.

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In *Fearne*, c. 6, s. 5 (edit. 1820, p. 365), it is said, "we are to remember, however, that a contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency;" and after stating the facts in *Weale v. Lower*, he says, it was agreed that the contingent remainder descended to the conusor's heir; and though the fine operated at first by conclusion, and passed no interest, yet the estoppel bound the heir; and that upon the contingency, the estate by estoppel became an estate in interest, of the same effect as if the contingency had happened before the fine was levied.

Upon these authorities we are of opinion that the fine in this case had a double operation, that it bound Mr. and Mrs. Stephenson by estoppel or conclusion so long as the contingency continued; but that when the contingency happened, the estate which devolved upon Mrs. Stephenson fed the estoppel; the estate created by the fine, by way of estoppel, ceased to be an estate by estoppel only, and became an interest, and gave Mr. Chandless, and those having right under him, exactly what he would have had had the contingency happened before the fine was levied.

Postea to the plaintiff.

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DOE D. WILLIAM HARRIS *v.* ELIZABETH
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(10 Barn. & Cress. 191—202; S. C. 5 Man. & Ry. 24; 8 L. J. K. B. 123.)

Testator devised to his daughter E. H., the wife of W. H., for life; remainder to John, his daughter's son, and his heirs and assigns for ever; but in case he should die before the testator's daughter E. H., and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person as she should think proper. The testator died in February, 1763, and John, the daughter's son, in April following. In January, 1766, the daughter had another son. In November, 1770, W. H. died, and in Hilary Term, 1773, E. H. levied a fine with proclamations: Held, that although at the death of the testator, and until the death of his grandson John, the power given to the daughter to devise to such person as she should think proper, could avail only as an executory devise, yet upon the death of John the character of the limitation changed, and it became a contingent remainder, and that it was therefore barred by the fine.

At the trial of this cause before Vaughan, Baron, at the Spring Assizes for the county of Worcester, 1828, a verdict was taken for the lessor of the plaintiff, subject to the opinion of this Court on the following case:

Shortly before the 19th day of February, 1763, John Ley died seised in his demesne as of fee of the premises hereinafter mentioned, having first duly made and published his last will and testament in writing, executed and attested so as to pass his real estate, bearing date the 20th of September, 1762, whereby (amongst other things) he gave, devised, and bequeathed as follows, "I give, devise, and bequeath unto my daughter Elizabeth Harris all those my two messuages or tenements lying and being in Clifton in the county of Worcester, (being the premises in question in this ejectment,) with the gardens, land, and appurtenances to the same belonging, to hold to her my said daughter for and during the term of her natural life, and from and after her decease, in case her husband William Harris shall survive her, then I give and devise the same unto him the said William Harris for the term of his natural life, and from and after the decease of the said William Harris and Elizabeth his wife, and the survivor of them, then I give and devise the said messuages *or tenements, with the appurtenances, unto my grandson John the son of my said daughter Elizabeth Harris,

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and his heirs and assigns for ever ; but in case my said grandson shall die before my said daughter, and she shall have no other child living at her death, then my will is that my said daughter shall give and devise the said premises to such person or persons as she shall think proper."

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The testator died without revoking or altering his said will with respect to the said devise, and was buried on the 19th day of February, 1763. The testator at the time of his death was a widower. William Harris and the testator's daughter Elizabeth who are named in the will were married on the 28th of April, 1762. John the testator's grandson, who is also named in the will, was the illegitimate son of the said Elizabeth by the said W. Harris and died in the month of April, 1763, aged about two or three years. W. Harris the lessor of the plaintiff is the son and heir-at-law of the said Elizabeth and W. Harris her said husband. and was born in the month of January, 1766. W. Harris the said husband of the said Elizabeth died in the month of November, 1770, leaving his said wife, and his said son Wm. Harris the lessor of the plaintiff, him surviving. On the 27th of December, 1772, the said Elizabeth, the widow and relict of the first-named W. Harris, intermarried with one Samuel Anthornies. In Hilary Term, 13 Geo. III., the said Elizabeth and Samuel Anthornies (her second husband) duly levied a fine with proclamations of the premises in question, in which fine one Robert Jones was plaintiff, and the said Elizabeth and S. Anthornies and one James Payne were defendants. Robert Jones afterwards conveyed the premises to a person of the name of Child, from whom, by divers *mesne assignments, they came into the possession of the present Earl of Coventry, whose tenants the defendants in this ejectment are. Elizabeth Anthornies died a widow in May, 1819, leaving W. Harris the lessor of the plaintiff, and her then only child, her surviving. The lessor of the plaintiff made an actual entry upon the premises within five years next after the death of Elizabeth Anthornies, and before the day of the demise laid in the declaration, for the purpose of avoiding the said fine, and also commenced this ejectment within one year after the making of such entry and duly prosecuted the same. The questions for the

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opinion of the Court were ; first, what estate in the premises of the said Elizabeth the daughter of the said testator and mother of the lessor of the plaintiff took under the said demise ? And secondly, whether the title of W. Harris the lessor of the plaintiff was or was not barred by the fine so levied by the said Elizabeth and S. Anthornies as aforesaid ?

This case was first argued at the sittings in banc after last Easter Term, by *Busby* for the plaintiff, and *Shutt* for the defendant. The former contended that W. Harris the grandson of the testator took under his will an estate in fee by implication, by way of executory devise, which was not barred by the fine ; that the limitation over to the daughter, in case she should have no child living at her death, she being the testator's heir-at-law, raised an estate by implication in favour of the lessor of the plaintiff, and that as that limitation over was after a previous fee given to the daughter's son John, it operated upon the testator's death by way of executory devise, and that a limitation which operates by way of executory *devise cannot be defeated or destroyed by any act of any of the preceding takers.

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The defendant insisted, first, that Elizabeth Harris took in tail ; that an estate could not be raised by implication upon a limitation which operated by way of executory devise ; and that the devisee ought to be named.

It was suggested by the Court that so long as John the son lived, the limitation over operated by way of executory devise ; but that as soon as John died, and his estate, which made the limitation over an executory devise, ceased, the limitation over operated by way of remainder, exactly as it would have operated had the will contained no limitation to the son ; and if that were the true light in which the case ought to be viewed, the defendant would be entitled to the judgment of the Court. The remainder to such child or children, if any, as Elizabeth should have living at her death, would clearly be contingent, and the destruction of her life estate by the fine would destroy the remainder, which had nothing but that life estate to support it.

They therefore ordered that there should be a second argument on the question, " Whether an executory devise might, by an event happening after the death of the testator, viz. by the death

of John his grandson, be converted into a contingent remainder.”
On a former day in this Term the case was argued on this point by

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Busby for the plaintiff :

In this case, the grandson W. Harris took an executory devise in fee by implication. It makes no difference whether the estate in remainder to John was vested or contingent. It is not *a case of contingency with a double aspect, as in *Loddington v. Kime*.† Here, John survived the testator for three years ; and if John, at the time of the death of the testator, took a vested remainder in fee, the limitation to any child then unborn could only be by way of executory devise : *Doe v. Selby*,‡ *Gulliver v. Wickett*.§ Next, suppose John took a contingent remainder.

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(LITTLEDALE, J. : The question to be discussed is, what estate William took. There can be no doubt that John took a vested remainder in fee.)

Then it is clear that William took by way of executory devise, and the death of John in the lifetime of the tenant for life, made no difference.

(BAYLEY, J. : That is the whole question, viz. Whether the circumstance which made the limitation to William an executory devise ceasing, it continued an executory devise or not.)

Shutt, contra :

There are many instances in which a testator having given a particular estate, with subsequent limitations, to take effect by way of contingent remainders, and the particular estate has failed in the lifetime of the testator, the other limitations have been held to take effect as executory devises : *Hopkins v. Hopkins*,|| *Stephens v. Stephens* ;¶ and where there is a class of executory devises, and one becomes vested, all the others become contingent

† 1 Salk. 228.

‡ 26 R. R. 585 (2 B. & C. 926).

§ 1 Wils. 105.

|| Cas. temp. Talb. 44.

¶ Cas. temp. Talb. 228.

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remainders :† *Hopkins v. Hopkins, Brownward v. Edwards*,‡
Fonnereau v. Fonnereau,§ *Doe v. Scudamore*.||

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Busby, in reply :

In those cases the alteration was made by an event happening in the lifetime of the testator.

Cur. adv. vult.

BAYLEY, J. delivered the judgment of the COURT :

This case was founded upon the will of John Ley. By that will he devised to his daughter Elizabeth, the wife of William Harris, for life, remainder to William Harris for life, remainder to John, his daughter's son, and his heirs and assigns for ever ; but in case he should die before the testator's daughter, Elizabeth Harris, and she should have no other child living at her death, his will was, that his said daughter should give and devise the premises to such person or persons as she should think proper. The testator died in February, 1768, and John, the daughter's son, in April following. In January, 1766, the daughter had another son, William, the lessor of the plaintiff. In November, 1770, William Harris died ; and in December, 1772, his widow married again. In Hilary Term, 1778, she and her second husband levied a fine with proclamations of the premises in question ; and the case depends upon the effect of that fine. If that fine barred the lessor of the plaintiff, the defendant is entitled to the property ; if it did not bar him, the property is his. In May, 1819, the testator's daughter Elizabeth died, and a proper entry was made to avoid the fine. The daughter was John Ley's heir. At the time, therefore, when the fine was levied (John the devisee in fee being dead, and William Harris being dead), the only parts of the will which continued capable of operating, were the devise to the daughter *for life, and the devise over in case she should have no other child living at her death, that she might give and devise the property as she should think proper.

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The question whether the plaintiff's title is barred by the fine

† *Fearne*, 525, 6th edit.

‡ 2 *Ves. Sen.* 243.

§ *Dougl.* 587.

|| 2 *Bos. & P.* 289.

levied by his mother Elizabeth, depends upon the quality and character of the power given to her by the will to give and devise the premises after her own death, in case she shall have no other child living at her death. If this be considered as an executory devise, the fine did not bar it; and the lessor of the plaintiff is entitled to recover. If it be considered as a contingent remainder, it was defeated by the fine.

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It is a maxim of law, that no limitation shall be considered as an executory devise which may be good as a remainder, the law favouring the alienation of property. In the present case, it is clear that at the death of the testator, and until the death of his grandson John, this limitation could avail only as an executory devise; and this not for want of a freehold interest to support it, but by reason of the previous gift of the whole fee to the testator's grandson John, if he had survived his mother. Upon the death of John, this necessity and the reason of it ceased, and the lands then stood limited to Elizabeth for life, remainder to her husband for life, with a power to her to give and devise the fee if she should have no other child living at her death. In this state of facts, therefore (that is upon the death of John), we think the character and quality of this limitation changed, and it became a contingent remainder. This appears to us to be conformable to the principle upon which executory devises are allowed, viz. the necessity to give effect to the intention of a testator.

In *Stephens v. Stephens*† the testator devised to his grandson William Stephens, his heirs and assigns for ever (after the death of the testator's wife), but if William should die under twenty-one, to his grandson Thomas and his heirs; but if he should die under twenty-one to such other son of the father and mother of William and Thomas as should attain twenty-one, in tail male, remainder to the daughters of their father and mother in tail general, remainder to Sir Richard Stephens in fee. William and Thomas both died under twenty-one; their father and mother had another son and daughter, Sarah and Thomas, and it was held by the Court of King's Bench, Lord HARDWICKE then being Chief Justice, that the limitation to such other son as the father and mother of William and Thomas should have (there being no

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† Cas. temp. Talb. 228; Fearn, 519.

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freehold to support it) was good by way of executory devise ; and that if the limitation to their sons and daughters in tail should fail, the estate would go to Sir Richard Stephens, by virtue of the remainder to him in fee. Lord Chancellor TALBOT decreed according to this decision, and expressed his satisfaction with it as agreeing with his own sentiments. Mr. Fearne observes upon this case, that until the estate vested in some son (of the father and mother of William and Thomas) who attained twenty-one, the limitations over to the daughter and Sir Richard Stephens must have been executory devises : but as soon as ever the estate should become vested in a son, then those subsequent limitations must, of course, have taken effect as vested remainders. In *Hopkins v. Hopkins*† there was a devise in *trust for B. for life, remainder to his first and other sons successively in tail male, remainder to the future sons of C. successively for life, remainder over. B. died in the life of the testator, and C. had no other son until some time after the testator died : it was held, that if the fee had not been in the trustees, B.'s death in the testator's lifetime would have made the limitations to the future sons of C. executory devises ; but that as soon as C. had another son, and the executory devise having thereby vested, the subsequent limitations would have ceased to have been executory devises, and would have been contingent remainders ; but C.'s son having died before any other estate vested, and the question being raised, whether the limitations over, prior to D.'s were not destroyed ? it was decreed by Lord Chancellor TALBOT that the legal estate was in the trustees, and protected those which would otherwise have been contingent remainders from destruction ; and that decision was afterwards acted upon by Lord HARDWICKE. That case, therefore, shews that limitations, which had previously been considered as executory devises, by the birth of a son (intended to be the first taker), became contingent remainders. And if an executory devise shall become a contingent remainder by the birth (of a person capable of taking) happening after the death of the testator, the same change must, by parity of reason, take place on the death of the person whose interest alone caused the limitation to be considered as an executory devise.

† Cas. temp. Talb. 44 ; Fearne, 304, 525.

That a limitation in a will which, at the time of making it, could only have operated by way of executory devise, may, by change of circumstances in the testator's *lifetime, operate at his death so as to give a vested estate in possession, or a vested remainder, or a contingent remainder liable to destruction, is laid down distinctly by Mr. Preston in his book upon Abstracts, vol. ii. p. 154, and it will be found upon examination that a change of circumstances after the testator's death, may change the character of a particular limitation, and make it operate at one time as a remainder, at another as an executory devise, and *e converso* at one time as an executory devise, at another as a remainder.†

And in Fearn's Essay on Contingent Remainders abundant proof will be found that where a limitation, which causes subsequent limitations to operate by way of executory devises, is removed, the subsequent limitations, if they do not give an estate in possession, will operate either by way of vested or contingent remainder, as they would have done had that limitation which made the others operate by way of executory devise never existed. In p. 506, Mr. Fearn says, "But here an observation is to be attended to, that notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise, yet a preceding executory limitation may be uncertain and contingent, when a subsequent one may be so limited, as to take effect either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. In either of those cases it must vest at the time appointed for the preceding limitation to vest: should the preceding limitation fail, the subsequent one will then vest in possession; *should it take effect the subsequent one will at the same instant vest in interest as a remainder upon the preceding one, and then become liable to the same modes of destruction, as other remainders of the same kind are subject to. And in addition to the cases I have mentioned of *Hopkins v. Hopkins*, and *Stephens v. Stephens*, Mr. Fearn adduces in different parts of his work, in illustration of the same doctrine, the cases of *Brownward v. Edwards*,‡ and *Gulliver v. Wickett*.§

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† Preston on Estates, vol. i. 59—
83, 87, 88. Preston on Abstracts,
vol. ii. 154, 172.

‡ 2 Ves. Sen. 243.
§ 1 Wils. 105.

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In *Gulliver v. Wickett*, the testator devised to his wife for life, remainder to the child his wife was then supposed to be pregnant with, and his heirs, but if he should die under twenty-one and without issue, then to B. and his heirs, this was held to be a good devise to the wife for life, with contingent remainder to the child in fee, with a good executory devise to B. in fee; and if the contingency of a child never happened, that the remainder to B. would take effect upon the death of the wife; and it will be seen that it would take effect as an ordinary remainder.

In *Brownward v. Edwards*,† where an estate was devised to B. and the heirs of his body if he attained twenty-one, but if he died under twenty-one, and (construed “or”) without issue, and he attained twenty-one, but died without issue, Lord HARDWICKE held that the remainder over would have enured by way of executory devise had B. died without issue under twenty-one, yet as he did not die till after the estate vested in him, the limitation over went by way of remainder.

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From these authorities we think it clear that a change of circumstances after the death of the testator may convert into a remainder what at the death of the testator and without such change could only have operated by way of executory devise, and that this will be the case where that limitation which alone would make the others executory devises is become incapable of taking effect, and if this be so this case is clear. For at the time this fine was levied, the only vested estate was in Elizabeth the testator's daughter, and her husband in her right, and the only other interest was a contingent remainder in favour of any child or children she should leave at her death, and that remainder the fine destroyed. For these reasons, we think the verdict must be entered for the defendants, according to the reservation in the case.

Postea to the defendant.

† 2 Ves. Sen. 243; Fearn, 506.

REX v. OGDEN AND FOUR OTHERS.†

(10 Barn. & Cress. 230—233.)

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An information in the nature of *quo warranto*, against persons claiming to act as a corporation, must be filed by and in the name of the Attorney-General.

Such an information cannot be filed at the instance of an individual against persons for usurping a franchise of a private nature, not connected with public government.

A RULE *nisi* had been obtained calling upon the defendants to shew cause why an information, in the nature of a *quo warranto*, should not be exhibited against them for acting as a corporation, by the name and style of the freemen and stallingers of the borough of Sunderland, without being authorised so to do. This rule had been obtained on affidavits of certain inhabitants of the town of Sunderland, stating, that certain persons, styling themselves freemen of the town of Sunderland near the sea, and certain other persons, styling themselves stallingers of the said town, had constituted and formed themselves into a certain supposed body or corporation within the town of Sunderland, called the freemen and stallingers of the borough of Sunderland, and that they claimed to exercise and enjoy and did exercise and enjoy certain corporate powers, authorities, and privileges within the said town over the rest of the *inhabitants of the said town; that the said pretended corporation consisted of twelve persons called freemen, and eighteen other persons called stallingers, and that they the freemen and stallingers denominated and represented themselves to the world as a corporate body, and to have good right and title to be and act as such by law; that they claimed to have and exercise and did exercise the power of electing their own members, in perpetual succession for ever; that they claimed to have and use a common seal for their pretended corporation, and that they claimed the right of making and did make bye-laws for the government of their pretended corporation; that they claimed to hold, for the benefit of themselves and their successors, the town moor of and belonging to the town of Sunderland near the sea aforesaid, and claimed to exclude and prevent the inhabitants of the town from the privilege

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† Dist. R. v. *White* (1836) 5 A. & E. 613, 618.

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and enjoyment of the herbage of the said town moor, and that the defendants claimed to be members of the corporation. The affidavits against the rule stated, that the freemen and stallingers had never interfered, nor was it their duty to interfere, with the rule or government of the town or borough of Sunderland, nor had they ever exercised or enjoyed or claimed to exercise or enjoy, nor did they exercise or enjoy, any corporate or other powers, authorities, privileges, or jurisdictions whatever within the same town over the rest of the inhabitants of the said town, or any of them, except such control as they possess over such of them as are members of the corporation; but that their acts have been confined to the management of their own private property.

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Sir James Scarlett and Patteson shewed cause :

An information in the nature of a *quo warranto* cannot be filed against an entire corporation by the master of the Crown office, but by the Attorney-General only. *Rex v. The Corporation of Carmarthen*[†] is an authority to shew that the statute of 9 Ann. c. 20, extends only to individuals usurping offices or franchises in a corporation, when the right of the whole body to act as a corporation is acknowledged. Another objection to this rule is, that the five persons against whom it has been obtained do not claim to be members of a corporation of a public nature. The franchise alleged to be usurped is not connected with the public government, but is of a mere private nature; and the practice of filing informations by leave of the Court is confined to cases which concern public government.

F. Pollock and Alderson, contra :

This is a proceeding, not against an entire corporation, but against five individuals. Undoubtedly, if it be an offence by the whole body to act as a corporation, it must be equally so by any of the members. This corporation claim to exercise over the moor an exclusive privilege by charter or grant. That is sufficient to call upon those who are members of it to shew by what authority they claim this exclusive right. In *Rex v. Reynell*‡ the Court held, that an information in the nature of a *quo*

† 3 Burr. 869.

‡ 2 Str. 1161.

warranto would lie for claiming an exclusive ferry over the river Thames from Laleham; and in *Rex v. Nicholson*† such an information was granted against trustees appointed by authority of an Act of Parliament for the *purpose of enlarging and regulating the port of Whitehaven.

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LORD TENTERDEN, Ch. J. :

If any number of individuals claim to be a corporation without any right so to be, that is an usurpation of a franchise; and an information against the whole corporation, as a body, to shew by what authority they claim to be a corporation, can be brought only by and in the name of the Attorney-General: *Rex v. The Corporation of Carmarthen*.‡ This rule must, therefore, be discharged.

BAYLEY, J. :

There is no instance of a *quo warranto* information having been granted by leave of the Court against persons for usurping a franchise of a mere private nature, not connected with public government.§

LITTLEDALE, J. concurred.

Rule discharged.

DAUBNEY, GENT., ONE, &C., v. COOPER, CLERK,
AND OTHERS.||

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(10 Barn. & Cress. 237—241; S. C. 5 Man. & Ry. 314; 8 L. J. K. B. 21.)

The proceeding against a party in a summary manner for keeping and using a gun to destroy game is of a judicial nature, at which all persons have a *prima facie* right to be present; and, therefore, where a magistrate had, without any specific reason, caused a party, who claimed a right to be present, to be removed from a justice-room, where such a proceeding was going on, it was held that he was liable to an action of trespass.

THE declaration alleged that the defendants, on, &c. at, &c. made an assault on plaintiff, and beat him and forced and compelled

† 1 Str. 299.

‡ 3 Burr. 869.

§ See Tancred on Information in the Nature of Quo Warranto, 14; and *Ibbotson's* case, Ca. temp. Hardw. 261; *Sir W. Lowther's* case, 2 Lord

Raym. 1409; S. C. 1 Str. 639, there cited.

|| See the principle of this case confirmed by the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43, s. 12).—R. C.

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him to go from and out of a certain room, there called the justice-room, in which the defendants, as justices of our lord the King, assigned to keep the peace, &c., were then and there holding a certain Court, to wit, a court of petty sessions for the administration of justice, whereby the plaintiff was hindered and prevented from exercising his business as an attorney in the said room. Second count, for a common assault and battery. Third, for an assault only. Plea, not guilty. At the trial before Best, Ch. J., at the Lincolnshire Lent Assizes, 1829, it appeared that on the 14th of February, 1828, one Preston was summoned to appear before the defendants, on the 18th of the same month, to an information charging that he, on the 3rd of January preceding, did unlawfully keep and use a gun to kill game. Preston requested the plaintiff to attend for him as his attorney, and did not go in person. The plaintiff attended accordingly in the justice-room, when the defendant Cooper, being informed that he attended on behalf of Preston, said, that the magistrates had resolved not to allow an attorney to appear, *and desired him to leave the room. The plaintiff refused to do so, and Cooper ordered the constable to remove him, which was done. For the defendants it was contended, that the plaintiff had no right to attend before the magistrates as attorney for a party summoned, and that he must be nonsuited. A verdict was then entered for the plaintiff by consent, with 1s. damages, subject to an application to this Court for a nonsuit. A rule *nisi* was accordingly obtained in Easter Term, 1829, against which

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Denman and *Fynes Clinton* shewed cause, and contended, 1st, that the magistrates, proceeding on the statute 5 Ann. 14, had no power to compel the appearance of the party summoned, and that, consequently, he might appear by attorney; and that the plaintiff, being an attorney of the Court of K. B., had a right to practise in any inferior Court: on this point they cited *Gilman v. Wright*,† *Hasting's case*,‡ *Rex v. Simpson*,§ *Hurst's case*,|| *Anon.*¶ And 2ndly, that as this was a proceeding in the nature

† 2 Keb. 477; 1 Ventr. 11; 1 Sid.
 410.

‡ 1 Mod. 23.

§ 1 Str. 44.

|| 1 Lev. 75.

¶ March. 141, pl. 214.

of a trial, and not a preliminary enquiry, the party accused had a right to avail himself of professional assistance: *Cox v. Coleridge*.†

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Adams and *Goulburn*, Serjts. *contra*, contended that at common law no persons had a right to appear by attorney; and they relied upon 2 Inst. 249, Bac. Abr. Attorney (B); where it is said, "On an indictment, information, or action for any crime whatsoever, under the degree of capital, the defendant may (by the favour *of the Court) appear by attorney." The information in this case cannot be distinguished from any other case not capital; and the party charged had no right to appear by attorney, the Court not having thought fit to allow it. The only ground on which any doubt can exist is, whether or not the plaintiff had a right to appear as an advocate for Preston: but, in the first place, he did not claim that right; and next, the proceeding was not necessarily taken at the petty sessions, but the conviction might have been by any single magistrate. Lastly, there was nothing to shew the magistrate that the plaintiff was duly authorised to appear as attorney or advocate for Preston, even supposing that the latter had power to give such authority. (During the course of the argument, the Court intimated an opinion that as the proceeding in question was of a judicial nature it could only be in a Court, and that all persons, whether attorneys or advocates or not, had a *primâ facie* right to be present).

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Cur. adr. vult.

The judgment of the Court was delivered by

BAYLEY, J.:

In this case, the Court, during the argument, intimated an opinion upon one particular point; and after thinking further upon the subject, and having had a conference with Lord TENTERDEN also, we adhere to the opinion we then formed. It was an action by the plaintiff against three justices for having turned him out of a room: and one of the questions which the parties were desirous of having agitated was, whether upon a

† 25 R. R. 298 (1 B. & C. 37).

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summary conviction upon the game laws the defendant had a right, as matter of right, to appear by attorney in the case. He himself was not present, but he insisted *upon a right to appear by his attorney. We do not think it at all necessary to give any opinion upon that point. Whether it may be matter of right, whether it may be matter of indulgence or not, or whether the magistrates have or have not a right to exercise a discretion upon that subject, are questions upon which we say nothing. When any such question shall arise we will decide it; but the ground upon which our present opinion is formed is, that the magistrate was proceeding upon a summary conviction, and, therefore, exercising a judicial authority. He was, as it were, a court of justice for that purpose; and we are all of opinion, that it is one of the essential qualities of a court of justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there be room in the place for that purpose,—provided they do not interrupt the proceedings, and provided there is no specific reason why they should be removed,—have a right to be present for the purpose of hearing what is going on. And in this instance, one of the three defendants, without any authority, without any ground of offence given by the party who was the plaintiff in this case, took upon himself to turn him out. It appeared in evidence that he was there as the friend of the then defendant, he might be there as one of the public: but as the friend of the defendant he might be desirous of knowing what evidence there was to support the case, and who were the witnesses; and it might be of great importance to the defendant; with a view to ulterior proceedings, if there should be misconduct on the part of the witnesses, and if the witnesses should state more than the facts warranted and beyond the truth, that he should have the opportunity of knowing what it was that was proved *against him, and of calling the party in question for that misconduct. The point which we decide is, that the magistrate in the exercise of a duty of this description, namely, by summarily convicting a party, is a species of Court, and is exercising a judicial function, and that his proceedings ought not to be private, but ought to be public; and therefore he was not warranted in removing the party now complaining of that

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removal. The action was brought against three defendants; Cooper was the only one who in any respect interfered as to turning the plaintiff out of the room, the other two defendants taking no part in this transaction. The verdict was against all. We are of opinion that it ought to stand against Cooper only, and that a verdict ought to be entered in favour of the other two defendants.

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SHAW v. PRITCHARD AND OTHERS.

(10 Barn. & Cress. 241—249; S. C. 5 Man. & Ry. 180; 8 L. J. K. B. 133.)

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A demise by a parson of his benefice, made subsequent to the 57 Geo. III. c. 99, for securing an annuity, is void, it being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20, which, as far as relates to chargings of benefices, remains in force, notwithstanding the partial repeal of that Act by the 57 Geo. III. c. 99.

THE following case was sent by the LORD CHANCELLOR for the opinion of this Court :

By indenture, bearing date the 8th day of September, 1826, and made between the Rev. William Pritchard, clerk, being then and still rector of the rectory and parish church of Great Yeldham in the county of Essex, and also vicar of the vicarage of Great Wakering in the same county, of the first part, Benjamin Shaw of the second part, and William Stephens of the third part, and duly executed by the said W. Pritchard, and a memorial thereof duly enrolled; after reciting that the said W. *Pritchard was rector of the said rectory and parish church of Great Yeldham, and in right thereof was seised or entitled of or to the glebe lands, together with all and singular the great or predial, and small tithes or tenths, moduses, or customary payments in lieu of such tithes or tenths, rents, offerings, and oblations, and other appurtenances to the same rectory or parsonage belonging or appertaining; and that the said W. Pritchard was also vicar of the vicarage of Great Wakering, and in right thereof was seised or entitled of or to the vicarial tithes to the said vicarage belonging; and also reciting, that the said W. Pritchard, together with John Daniel Haslewood, clerk, had contracted to sell to the said B. Shaw one annuity of 93*l.* 10*s.*, to be paid to the said B. Shaw, his executors, administrators, or assigns, during the

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natural life of the said W. Pritchard, at or for the price or sum of 750*l.*; and that, in pursuance and performance of the said agreement on the part of Shaw, he Shaw had paid to Pritchard and J. D. Haslewood the sum of 750*l.*; and that in pursuance and part performance of the said agreement on the part of Pritchard and J. D. Haslewood, they Pritchard and J. D. Haslewood had, by a certain bond bearing even date with the said indenture, become bound unto Shaw, his executors, administrators, and assigns, in the penal sum of 1,500*l.*, with a condition thereunder written for making the same void, on payment by Pritchard and J. D. Haslewood, or one of them, their or one of their executors or administrators unto Shaw, his executors, administrators, or assigns, yearly and every year during the natural life of Pritchard, of the said annuity of 93*l.* 10*s.* by four equal quarterly payments (on the *days therein mentioned): it was by the said indenture witnessed, that in pursuance and performance of the said agreement on the part of Pritchard, and in consideration of the said sum of 750*l.* then paid by Shaw to Pritchard, and for the nominal consideration therein mentioned to have been paid by Stephens to Pritchard, he Pritchard did, at the request of Shaw, grant, bargain, sell, and demise unto Stephens, all that and those the said rectory and parish church of Great Yeldham, and the said vicarage of Great Wakering, and all the messuages or tenements, and glebe lands, tithes, tenths, oblations, obventions, offerings, portions, profits, emoluments, rights, members, and appurtenances whatsoever, thereunto belonging, to have and to hold the said rectory and vicarage, messuages or tenements, glebe lands, tithes, hereditaments, with their rights, members, and appurtenances, unto Stephens, his executors, &c., thenceforth for and during the full end and term of ninety-nine years from thence next ensuing, if Pritchard should so long live, yielding and paying, therefore, yearly and every year during the said term unto Pritchard, the rent of a pepper corn, if lawfully demanded, upon trust to permit Pritchard or his assigns to hold and enjoy the said rectory and vicarage, and lands and premises, and to receive the rents, issues, and profits thereof respectively, for his proper use and benefit, until the said annuity or some quarterly payment thereof should be

in arrear by the space of twenty-one days next after the same should be payable as therein mentioned; and upon further trust, that in case default should at any time thereafter be made in the payment of the annuity, or any part thereof, for twenty-one days after *the same should become payable, Stephens, his executors, &c., should enter into the actual possession of all and singular the rectory and vicarage, hereditaments, and premises therein granted and demised, or expressed and intended so to be, and receive all the tithes or compositions, or payments for or in lieu of tithes, and all other the rents, issues, and profits of or belonging to the same rectory and vicarage, hereditaments and premises respectively, and should from time to time set, let, order, or manage the same rectory and vicarage, hereditaments, and premises in such manner as to him should seem reasonable; and upon trust out of the residue of the said monies to pay the said B. Shaw, his executors, &c. the said annuity, or so much thereof as should not have been otherwise satisfied, and to pay the ultimate residue or surplus of the said monies unto Pritchard, his executors, &c. And it was also thereby declared, that if the said annuity, or any part thereof, should at any time be in arrear for forty days next after any of the days on which the same ought to have been paid as aforesaid, it should be lawful for Stephens, his executors, &c., and he was thereby directed (if requested so to do by Shaw, his executors, &c.), by demising, leasing, mortgaging, or selling the said rectory and vicarage, hereditaments and premises, or any part thereof, for all or any part of the said term of ninety-nine years, or by such other ways and means as to him or them should seem meet, to levy and raise such sums of money as would be sufficient, or, as he or they should think fit or expedient, to raise for paying and satisfying to Shaw, his executors, &c. the said annuity, or such part thereof as should be in arrear, and all costs, charges, and expenses which Shaw, his executors, *&c., or Stephens, his executors, &c. should sustain by reason of the nonpayment of the said annuity or otherwise in the execution of the trusts of the said indenture. And Pritchard did thereby for himself, his heirs, executors, and administrators, covenant with Shaw, his executors, &c., that in case the said annuity, or any quarterly payment thereof, should

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happen to be behind or unpaid by the space of forty-five days next over or after any of the said days and times on which the same were appointed to be paid as aforesaid, and Shaw, his executors, &c. should deem it expedient to sequester the said rectory and vicarage, or either of them, it should be lawful for Shaw, his executors, &c., and Pritchard did thereby authorize and empower him and them to sequester the said rectory and vicarage, or either of them, for payment of the arrears of the said annuity, or any part thereof, and particularly to instruct counsel or civilians to act for Shaw, his executors, &c., and for Pritchard, and in his name, either in courts of common law, civil law, or equity, or elsewhere, as occasion should require, to assent to and concur in all such proceedings as might be necessary to obtain an immediate sequestration of the said rectory and vicarage, or either of them, and that without giving notice to, or advising or consulting with Pritchard thereupon. The question for the opinion of this Court was, whether the above demise for securing an annuity being subsequent to the 57 Geo. III. c. 99, was valid or not?

The case was now argued by

Manning for the plaintiff, and by *Chitty*, *Patteson*, and
Follett for other parties in support of the demise :

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This grant or demise was no doubt good at common law ; and the first question that arises is, whether it was affected by the statute 13 Eliz. c. 20, or 14 Eliz. c. 11? The 13 Eliz. c. 20, enacted, “ That all chargings of benefices with cure, thereafter, with any pension or with any profit out of the same to be yielded or taken, other than rents to be reserved upon leases thereafter to be made, according to the meaning of that Act, should be utterly void.” The instrument in question is, in common parlance, a lease, and not a charge, which means something issuing out of land ; and the practice which has prevailed explains this, for such leases were constantly granted before the enabling statute 43 Geo. III. c. 84 (which by section 10 repealed the 13 Eliz. c. 20) was passed, and no objection was taken to them as being in contravention of that Act : *Bromley v.*

Holland,† *Erington v. Howard*,‡ *White v. The Bishop of Peterborough*.§ And the objectors to the deed are in this dilemma, if it is within the statute 13 Eliz. c. 20 as a charge, it is also within it as a lease, and is therefore valid : *Bowyer v. Pritchard*.||

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(BAYLEY, J.: It may be in form a lease, but in substance a charge.)

Supposing, however, this deed to be within the 13 Eliz. c. 20, or the 14 Eliz. c. 11, by which it was enacted, "That all bonds, contracts, promises, or covenants thereafter to be made for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to take the profits thereof, other than such bonds and covenants as should be made for assurance of any lease theretofore made, should be to *all intents and purposes adjudged of such force and validity, and not otherwise, as leases by the same persons made of such benefices and ecclesiastical promotions with cure," those statutes were wholly repealed by the 43 Geo. III. c. 84, s. 10, and were not revived by the 57 Geo. III. c. 99. This latter statute begins by reciting two statutes of the reign of Henry VIII., the statutes 13 Eliz. c. 20, 14 Eliz. c. 11, and several others, and then proceeds, "Be it enacted, that so much of the said several Acts passed in the reign of Henry VIII., and so much of the said Acts of the reign of Queen Elizabeth, &c. as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices, shall be repealed;" and it is supposed that so much only of the statute of Elizabeth as relates to leases of benefices, commonly so called, is thereby repealed; but that is a very narrow construction. It was evidently the intention of the Legislature to make an entirely new code on the subject of the incumbrance of ecclesiastical property. The words "so much of" were necessary as to the statutes of Hen. VIII. and the 14 Eliz. c. 11, which relate to many other things besides those which were then in the contemplation of the Legislature,

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† 6 R. R. 58 (5 Ves. 610; 7 Ves. 3, 14).

‡ *Ambler*, 485.

§ 19 R. R. 183 (3 Swanst. 109).

|| 11 Price, 103.

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but 13 Eliz. c. 20 did not; and therefore it must have been their intention to repeal the whole of that Act. And that the Legislature did not mean to confine the operation of the 57 Geo. III. c. 99 to the repeal of the former Acts only as to leases properly so called, is clear, for they meant to repeal some part of the 14 Eliz. c. 11, and no part of that relates to leases, but to certain securities or covenants which were to have the force of leases.

[*248] The *deed in question is precisely within that description; if then it falls within the statute 14 Eliz. c. 11, that statute is clearly repealed; if it does not, it is within the 13 Eliz. c. 20, as being a lease; and that statute, as to leases, is admitted to be repealed; and therefore, *quacunq̃e viâ*, the deed is valid. At all events, it is binding during the life of the incumbent.

Brodrick, contra :

It is quite clear that the demise in question is within the 13 Eliz. c. 20, and that the provisions of that statute are now in force as to every thing but leases, properly so called. The object of that statute is clearly explained by the preamble, it was passed in order that "the livings appointed for ecclesiastical ministers might not, by corrupt and indirect dealings, be transferred to other uses;" and after providing that leases should only continue valid during the residence of the incumbent, enacted, that all chargings of any benefice, with any profit out of the same, to be yielded and taken, &c. should be void. This demise does charge the benefice with a profit to be yielded and taken out of it, not upon a lease for the benefit of the minister, but so that the living may, by this indirect dealing, go to other uses: *Mouys v. Leake*.† The statute then distinguishes between leases and other charges, it is repealed as to the former, but not as to the latter, and therefore continues in operation as to the charge in question. This was taken for granted in *Doe v. Somerville*,‡ and expressly decided in *Doe v. Gully*.§ As to the deed being valid during the life of the incumbent, *that only applies to cases under the 13 Eliz. c. 10, which was passed for the protection of the successors of incumbents, and not

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† 8 T. R. 411.

‡ 6 B. & C. 126.

§ 9 B. & C. 344.

under the 13 Eliz. c. 20, which was to protect the incumbents themselves.

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Cur. adv. vult.

The following Certificate was afterwards sent :

" This case has been argued before us by counsel, and we are of opinion that the demise for securing the annuity in question is invalid, being in substance a charging of the benefice within the meaning of the 13 Eliz. c. 20, which, as far as relates to chargings of benefices, is now in force.

" J. BAYLEY.

" J. LITLEDALE.

" JAS. PARKE."

SPRATT v. JEFFERY.†

(10 Barn. & Cress. 249—262; S. C. 5 Man. & Ry. 188; 8 L. J. K. B. 114.)

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By contract A. agreed to sell to B. the two leases and good will in trade of a public house, and shop adjoining, for the sum of 4,250*l.*, "as he holds the same," for terms of twenty-eight years from Midsummer next ensuing, at the annual rent therein mentioned, and B. agreed to accept a proper assignment of the said leases and premises as above described, without requiring the lessor's title; and upon payment of the said sum of 4,250*l.*, A. agreed to execute an effectual assignment of the said leases, and deliver up possession of all the said premises: Held, that the true meaning of this agreement was, that the purchaser was to purchase the two leases without enquiring into the title of the lessor, and could not refuse to complete his purchase on account of an objection to that title.

THIS was an action of assumpsit tried before Lord Tenterden, Ch. J. at the Middlesex sittings after Michaelmas Term, 1828, when a verdict was found for the plaintiff, for 280*l.* damages and costs of suit, subject to the opinion of this Court on the following case :

On the 23rd April, 1828, the plaintiff and defendant entered

† Compare *Shepherd v. Keatley* (1834) 1 Cr. M. & R. 117; *Waddell v. Woolfe* (1874) L. R. 9 Q. B. 515, 43 L. J. C. P. 138. In these cases, some doubt was thrown upon the decision in *Spratt v. Jeffery*; but the terms of the contract are different. And see per NORTH, J. *In re National Provincial Bank of England and Marsh*, '95, 1 Ch. at pp. 194, 195, 64 L. J. Ch. 255, and *In re Scott and Alvarez's Contract*, '95, 2 Ch. 603, 64 L. J. Ch. 821, C. A. See now also the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2.—R. C.

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into the following agreement: "William Jeffery of Newington Butts, Surrey, victualler, doth agree to sell unto William Spratt of Shadwell, the two leases and *good-will in trade, of the house and premises now occupied by him, known by the sign of the 'Rockingham Arms,' and shop adjoining, situated at Newington Butts, in the parish of Saint Mary, in the county of Surry aforesaid, for the sum of 4,250*l.*, as he holds the same, for the term of twenty-eight years from Midsummer next ensuing, at the annual rent of 126*l.*, and under fair and usual covenants only, except that the lessee is to insure and to keep the house as a tavern or coffee-house, and to be called the 'Rockingham Arms.' And the said William Spratt doth hereby agree to accept a proper assignment of the said leases and premises as above described without requiring the lessor's title; and that he will pay unto the said William Jeffery, the said sum of 4,250*l.* for the same, also the amount at which the goods, fixtures, effects, and stock in trade shall be valued as aforesaid, together with the proportionate value of the unexpired term in the licences, after deducting the sum of 200*l.* which has now been paid as a deposit, (the receipt whereof is hereby acknowledged,) and take possession of the said house and premises on or before the 5th day of May next ensuing, at which time, upon payment of the several sums as aforesaid, he, the said William Jeffery, doth agree to execute an effectual assignment of the said leases, and deliver up possession of all the said premises except the shop which is underlet at will, and also the effects and stock in trade, and to assign over good and sufficient licences to the said William Spratt, also to repair or allow for the external damaged window, and pay or allow for all rent, taxes, gas, and outgoings up to the day of quitting possession."

[*251] Shortly after the above agreement was executed, the *plaintiff's attorney received from the defendant's attorney, an abstract of the vendor's title to the premises in question, entitled, "Abstract of the title of Mr. William Jeffery, to leasehold premises called the 'Rockingham Arms,' in the parish of St. Mary, Newington, in the county of Surry." The abstract set forth an indenture of lease, dated the 2nd of March, 1813, made between John Carter and Samuel Brandon therein described, as the then trustees of the will of Thomas Brandon deceased of the first part; Stephen Hall,

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on behalf of himself and his infant children, William Smith and Mary Ann his wife, Thomas Fleming and Harriet his wife (which said Mary Ann Smith and Harriet Fleming were stated in such lease to be the only then surviving children of the said Thomas Brandon, deceased, and to be, with the infant children of the said Stephen Hall, by his late wife Elizabeth Hall deceased, one other of the daughters of the said Thomas Brandon deceased, the only devisees and legatees named in his last will and testament,) of the second part; and Joseph Denyers of the third part. By this lease John Carter and Samuel Brandon, with the consent and approbation of the parties thereto of the second part, demised the premises in question to Denyers for twenty-five years, from the 24th of June, 1812, at the yearly rent of 126*l*. After stating several mesne assignments, the abstract shewed that, by an assignment dated the 2nd of June, 1824, the lease and premises became vested in Alexander Magnus for the residue of the term. The abstract then set forth an indenture of lease, dated the 17th of June, 1825, between John Webster of Upper Grosvenor Street, Grosvenor Square, in the county of Middlesex, Doctor of Medicine, therein described as the then only continuing *trustee of the estates of the said Thomas Brandon, deceased, of the first part; Stephen Hall, Thomas Fleming, George Webster, and Elizabeth his wife, late Elizabeth, spinster, Mary Ann Hall and Jane Hall of the same place, spinster, Stephen Hall, Thomas Brandon Fleming, and Harriet Fleming, therein described as parties beneficially entitled to the estates of the said Thomas Brandon of the second part; and the said Alexander Magnus of the third part. By this indenture it was witnessed, that in consideration of 1,000*l*. paid by Magnus to the parties thereto of the second part, the said Thomas Webster, by the consent and direction of the parties of the second part, demised the premises in question to Magnus, to hold to Magnus, his executors, administrators, and assigns, for nineteen years, to commence and be computed from the 24th of June, 1837, at the yearly rent of 126*l*. The abstract then stated a bond, also dated the 17th June, 1825, from the parties of the second part to the last mentioned indenture of lease, to Magnus, his executors, administrators, and assigns, in the penal sum of 2,000*l*. for quiet enjoyment of the premises

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against John Webster, his executors, administrators, and assigns, themselves and any claimants under them, or the said Thomas Brandon, deceased. The abstract, after divers mesne assignments, then shewed an assignment by indenture, dated 10th June, 1826, of both the above leases to the defendant, the consideration for which assignment was 4,000*l*. After perusing the abstract, the plaintiff's attorney returned it to the defendant's attorney, with several queries on the title within in the margin; and amongst them were enquiries, whether the trustees under the will of Thomas Brandon, named as the granting parties in the two indentures of *lease of the 2nd March, 1813, and the 17th June, 1825, had power to grant leases upon a premium, and whether the respective directing parties to those leases were all the parties beneficially interested in the demised premises?

On the 5th May the vendor's attorney returned the abstract, and in answer to those enquiries, referred generally to the will of Thomas Brandon, and at the same time required the plaintiff's attorney to forward the draft assignment as soon as possible.

Upon examining the will it appeared that Thomas Brandon devised the premises in question, with other property, to trustees, their executors, &c. (amongst whom was John Carter, one of the granting parties in the lease of 2nd of March, 1813, in trust for his, the testator's, three daughters Mary Ann Brandon, Elizabeth Brandon and Harriett Brandon, in equal shares, as tenants in common, and not as joint tenants, and for their respective executors, &c. &c., subject to a proviso that it should be lawful for the said trustees, or the survivors or survivor of them, to demise the estates devised to them in trust, on building or repairing leases, or common tenants' leases, for any term of years, so as all such leases, made in pursuance of that his will, should be made to take effect in possession and not in reversion, or by way of future interest, and so as upon every such lease or demise there should be reserved, during the continuance thereof, the best and most approved rent that could be reasonably had or gotten for the same, without taking any sum or sums of money by way of fine or foregift.

At the time when the indenture of lease dated the 17th of June, 1825, was granted, several children of Elizabeth Brandon

and Harriett Brandon mentioned in the will of Thomas Brandon, beneficially interested in the premises *under the will, were living and infants, and did not join in the lease; and some of such children were living and infants at the time when the above agreement was made between the plaintiff and the defendant, and also at the time when the cause was tried. On the 5th of May, the day appointed by the contract for the completion of the purchase, the defendant was prepared to give possession of the premises, and to assign the leases, and the plaintiff attended on the premises with his broker, but his attorney did not attend; and on the following day, by letter to the defendant's attorney, the plaintiff's attorney stated, that before he proceeded any further in the business, or gave any answer to the question put to him by the defendant's solicitor that evening, requiring to be informed whether they meant to complete the purchase or not, he wished to be informed whether the answers returned to the plaintiff's solicitor's queries on the abstract, contained all the information intended to be furnished; and whether the deeds which he the plaintiff's attorney required would be produced to them: to which letter the defendant's attorney returned for answer, that he did not feel himself bound to give any further answers to the queries in the abstract; that the deeds required to be produced were not in his possession; and that the same related to the lessor's title, which the purchaser was not at liberty to enquire into. On the 12th of May, seven days after the day appointed for completing the contract, the plaintiff's attorney, by letter, informed the vendor's attorney that he had inspected the will of the late Thomas Brandon at Doctors' Commons; that it appeared that the will gave a power to the trustees to grant leases, so that no premium be taken for the granting thereof; and that *the term be made to commence in possession and not in reversion. He further stated, that the title to the second lease appeared on the face of the abstract connected with the information acquired by the inspection of the power under which it was granted to be decidedly defective, a premium having been taken for the granting thereof, and the term being made to commence in reversion and not in possession. Under these circumstances, he informed the vendor's attorney that it was the intention of his client to

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rescind the contract, and to require the payment of the deposit-money with interest, and the plaintiff's expenses, together with the 500*l.* agreed to be paid as liquidated damages. This requisition the defendant refused to comply with. All the parties interested who were of age when the second lease was granted, joined therein, and received the consideration-money, and laid out the whole of it in beneficially improving other parts of the property devised by the will, whereof the premises in question are parcel, for which purpose money was wanted. The defendant, at the time of making the contract, declared to the plaintiff and his broker, that he defendant would sell no other title than what he held, and that he would not sign the agreement unless the stipulation respecting the nonproduction of the lessor's title was introduced. The rent of 126*l.* per annum was not, at the time of the trial of the cause, the best and most improved rent that could be reasonably had or gotten for the premises.

Jardine for the plaintiff:

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The second lease which the defendant contracted to sell is void in equity. It was granted by trustees under a power, but not according to the power. This is not like an informal execution *of a power; and therefore it is void, and cannot be confirmed. The plaintiff must consequently be entitled to recover, unless there be any thing in the agreement binding him to accept such title as the defendant had, whatever that might be. The plaintiff had not any notice that the title was defective or even doubtful, and therefore his agreement to take it, although bad, should be clearly established. The argument for the defendant must rest entirely on the words of the agreement, "as he holds the same;" and it will be said, that by those words the plaintiff was bound to take the title, good or bad. But they were not intended to bear that construction, they merely apply to the circumstances of occupation without reference to the title. The agreement is divided into two parts. The first contains the undertaking of the defendant to sell, and must therefore be construed against him; the words in question occur in that part of the agreement. The second part contains the stipulation by the plaintiff, to accept an assignment without requiring the lessor's title. Now it has been

decided that these words, although they exonerate a vendor from the necessity of making out that the lessor had a good title, do not preclude the purchaser from shewing it to be bad and insisting on the objection: *White v. Foljambe*.† These words, then having this limited operation, would have been perfectly unnecessary if the expression, “as he holds the same,” had the effect to be contended for on the other side. The case of the plaintiff, however, does not depend entirely on that point, for the lease being granted under a power, the testator, who created the power, must be considered as *the lessor; to his title no objection is made, the objection made is to the title of the lessee, in consequence of a defect in the lease. Again, if the words “as he holds the same,” are considered as referring to the title and not to the occupation of the defendant, it was a misdescription, for he did not hold the premises under the two leases. The whole was held under the first lease, the second was a lease in reversion, the defendant therefore misdescribed in the contract the interest which he had, and cannot insist upon making the plaintiff take it: *White v. Foljambe*,† *Deverell v. Lord Bolton*.‡

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Campbell, contra :

The defendant in this case guarded himself, both by writing and parol, against the necessity of warranting the lessor's title to the premises, and he did not misdescribe that which he contracted to sell. In the cases cited, there was a contract to sell the residue of a term, whereas there appeared to be two, one of them in reversion. Here the defendant contracted to sell and assign two leases; and he is ready to assign them. The only important question is, whether the agreement is to be considered as containing a warranty of the lessor's title, or whether the defendant merely undertook to sell that which he had. The latter clearly is the meaning of the agreement, which is to sell two leases of certain premises, “as he holds the same,” for terms of twenty-eight years. The two leases are clearly the antecedent to which the latter part refers, and it therefore applies to the holding of the leases, and not to the occupation of the premises. As to the subsequent *stipulation, as to not requiring the lessor's title,

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† 11 Ves. 337.

‡ 18 Ves. 505.

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that is like many other things in conveyances, introduced from abundant caution, and strengthens rather than weakens what has gone before. The case of *Freme v. Wright*† cannot be distinguished from this. There the assignees of a bankrupt contracted to assign his interest in certain premises, under such title as he lately held the same, and although the title was defective, a specific performance was decreed against the purchaser, and the Vice-CHANCELLOR there said, that “although a party proposing to sell an estate without a qualification, asserts, in fact, that it is his to sell, and that he has a good title, yet he may, if he thinks fit, contract to sell such title as he has, and the question is, whether he did make such a contract.”

(LITLEDALE, J. : I doubt whether that was the case here.)

Jardine in reply :

The meaning of the words, “without requiring the lessor’s title,” is easily discovered, by considering the state of the law as to that which may be required of the vendors of leasehold estates. It was formerly doubted whether the vendor, who made no stipulation on the subject, could be called upon to shew that the lessor had a good title; but at that time no doubt was ever entertained that the purchaser might, if he could, shew it to be bad, and reject the bargain. In *Purvis v. Rayer*,‡ it was finally decided that the vendor was bound to shew the lessor’s title, and the words in question were introduced in order to obviate that difficulty. The effect of them is, that the lessor’s title must *be assumed to be good until the contrary is proved; but they do not affect the right of the purchaser to insist on any objection that he can establish to that title.

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BAYLEY, J. :

I entertain no doubt on this question. The plaintiff might have had all that he bargained for, and therefore is not entitled to recover back his deposit. At the time when the contract of sale was made, the defendant, in fact, held two leases, and under

† 20 R. B. 313 (4 Madd. 364).

‡ 23 R. B. 707 (9 Price, 488).

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those, if valid, he might occupy for the whole of the terms granted; or, if evicted, he might maintain an action of covenant on the word "demise," which occurs in both the leases. This being the state of things at the time of the bargain being made, let us see what were the terms of it. The defendant agrees to sell, not the premises for a given term, but the two leases and good will in trade of the premises, at a certain sum, as he holds the same, for terms of twenty-eight years. One objection made on behalf of the plaintiff is, that this being a bargain to sell two leases for terms of twenty-eight years the leases must be taken to be concurrent, and not consecutive leases, and that consequently the defendant contracted to sell that which he had not. Two cases were cited on this point, but in each of them the language of the contract was very different; in each the bargain was to sell the residue of a term. Here it is to sell *two* leases, and the rent being one, any lawyer would at once conclude that the leases were consecutive; that objection therefore fails. The defendant then having bargained to sell the two leases and good will, the plaintiff agrees to accept an assignment, without requiring the lessor's title, and to pay for the same 4,200*l*. The fair and reasonable construction of those words is, *that he shall not be at liberty to raise any objection to the lessor's title. By the purchase of a bad lease, the party may derive the same benefit as if it were good; and if he cannot, the lessee or his assignee has a remedy over against the grantor of the lease. The plaintiff, therefore, under the circumstances of this case, may either have the premises for the two terms, or an equivalent compensation. Upon the whole, it appears to me that the defendant was bound by this contract to assign the leases, such as they were; and that the plaintiff is precluded from calling in question the title of the lessor.

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LITTLEDALE, J. :

Upon the whole, I am inclined to give judgment for the defendant, but am not without considerable doubts as to the propriety of it. The objection on the ground of misdescription does not appear to me entitled to any weight. The next question is as to the meaning of the words, "as he now holds the same." Do

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they describe the premises or the defendant's interest? I think they were meant to describe the interest, viz. twenty-eight years, without reference to and without affecting the question of title. It could not be intended to exclude all enquiry as to the title, for the defendant was not the original lessee. Some of the mesne assignments might be defective, and the plaintiff might clearly enquire into any defects except those in the title of the original lessor. The main difficulty arises from the words "without requiring the lessor's title." Taking the agreement altogether, I am disposed to say that the defendant contracted to sell a qualified title only. But then it is contended, that the devisor was in law the lessor, for he created the *power under which the leases were granted. In some instances of leases under powers, the creator of the power is deemed the lessor: *Isherwood v. Oldknow*.† But as nothing was said in this contract about the leases being granted under a power, the meaning of the words probably was, that the title of the party who actually granted them should not be enquired into; and on that ground I concur in giving judgment for the defendant.

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PARKE, J. :

I am of opinion that the defendant is entitled to the judgment of the Court. If the defendant has been ready to perform his engagement, no action can be maintained against him, although the plaintiff may have discovered that his bargain is of no value. The real question is, whether the defendant has performed or offered to perform his engagement. The first objection is, that the contract was to sell concurrent leases. I think there was no such engagement, but that the contract was to sell consecutive leases. In the next place, it is said that the defendant has not been ready to give the plaintiff all that he contracted to sell. There can be no doubt that the vendor of a lease unconditionally, undertakes to give a good title, but every person may enter into a qualified contract. This certainly was so to some extent. The question is, to what extent the qualification goes, and I think that depends upon the words as to not requiring the lessor's title.

† 16 R. R. 305 (3 M. & S. 382).

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They could not mean that the vendor should merely assign such interest as he had, for an objection arising after the original grant might have been made. The words "as he now holds the same," are ambiguous, *but the plaintiff contracted to pay for an assignment without requiring the lessor's title. For the plaintiff, it is contended that he is nevertheless at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained. Then it was said, that this is not an enquiry into the lessor's title, but into the derivative title; but the meaning of the words must be, that the plaintiff should not require the title of the lessor to grant the leases; and it seems to me that the person who made the lease was the grantor, the legal estate was in him, and the term given was to be derived out of that estate. I think then that the defendant having offered to assign the leases, was ready to perform all that he engaged to do, and the plaintiff was not at liberty to object to the title of the lessor to grant those leases.

Postea to the defendant.

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(10 Barn. & Cress. 263—277; S. C. 5 Man. & Ry. 251; 8 L. J. K. B. 14.)

In an action for slander, for words spoken of the plaintiff in his trade, importing a direct assertion made by defendant that the plaintiff was insolvent, the defendant pleaded that one T. W. spoke and published to the defendant the same words, and that the defendant, at the time of speaking and publishing them, declared that he had heard and been told the same from and by the said T. W.: Held, upon demurrer, that this plea was bad, on the grounds (*inter alia*) (1) that it did not give the plaintiff any cause of action against T. W., inasmuch as it did not allege that T. W. spoke the words falsely and maliciously; and (2) that it is not an answer to an action for oral slander for a defendant to shew that he heard it from another, and named the person at the time, without shewing that the defendant believed it to be true, and that he spoke the words on a justifiable occasion.

DECLARATION for slander stated, that the plaintiff before the time of the committing of the grievances thereafter mentioned,

† Followed in *Watkin v. Hall* (1868) L. R. 3 Q. B. 393, 37 L. J. Q. B. 125, 18 L. T. 561.—R. C.

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and from thence had been and still was a coach proprietor, and sold and disposed of cattle for divers persons for commission, and that he had never been suspected to be insolvent, or unable or unwilling to pay his just debts; that defendant contriving, and wickedly and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed by his neighbours that the plaintiff was poor, and in indigent and bad circumstances, and incapable of paying his just debts, and debts to be by him contracted, and thereby to injure him in his trade and business, falsely and maliciously spoke and published in the hearing and presence of divers good and worthy subjects of this realm of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, the false, scandalous, malicious, and defamatory words following, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach (meaning the said plaintiff's coach), on the road, he (meaning the said plaintiff) has been arrested, and the bailiffs are in his (meaning the *said plaintiff's) house," thereby then and there meaning and intending that the said plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. By means of the committing of which said grievances by the defendant, he the plaintiff was greatly injured in his good name, &c.; and also by means of the premises, one Morrison, who before the committing of the said grievances was about to send, and otherwise would have sent divers, to wit, eleven head of cattle to the plaintiff, for the purpose of being sold and disposed of by the plaintiff for Morrison for commission and reward payable to the plaintiff in that behalf, to wit, on the day and year aforesaid, wholly refused and declined so to do, and thereby the plaintiff lost and was deprived of the commission which would have been payable by Morrison to the plaintiff. Plea, that before the speaking and publishing of the several words in the declaration mentioned, and therein supposed to have been spoken and published by the said defendant, of and concerning the said plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, to wit, on, &c. at, &c. one T. W. Woor of Swaffham, in the county of Norfolk, spoke and

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published the following words to the defendant of and concerning the plaintiff, and of and concerning and relating to him in his trade or business of a coach proprietor, that is to say, "His (meaning the said plaintiff's) horses have been seized from the coach, (meaning the plaintiff's coach) on the road; he has been arrested, and the bailiffs are in his house;" thereby then and there meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts. And the defendant further saith, that at the time of speaking and publishing *the said several words in the declaration as therein mentioned, he the defendant also declared, in the presence and hearing of the same persons in whose presence and hearing the said words were so spoken by him the defendant, that he had heard and been told the same from and by the said T. W. Woor of Swaffham, in the county of Norfolk; wherefore he the defendant, at the said time when, &c. in the said declaration mentioned, did speak and publish of and concerning the plaintiff the said several words in the said declaration mentioned, as he lawfully might for the cause aforesaid. General demurrer and joinder. The Court called upon

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Platt to support the plea :

It is a sufficient justification to an action for slanderous words first spoken by a third person, for the defendant to shew that at the time he repeated them he mentioned the name of that person. In the fourth resolution in *Lord Northampton's case*† this is said: "In a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or thief; in action of the case, if the truth be such, he may justify. But if J. S. publish that he hath heard generally, without a certain author, that J. G. was a traitor or thief, there an action sur le case lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any, but against himself, who published the words, although that in truth he might hear them; for otherwise this might tend to great slander of an innocent."

† 12 Co. Rep. 134.

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(PARKE, J. : According to that resolution the party who repeats the slander is bound to give the party slandered a complete cause of action against the original *author. The plea here does not shew that the words were spoken by Woor under such circumstances as would give the plaintiff any cause of action against him. It does not aver that Woor spoke the words falsely and maliciously. It does not, therefore, shew that the plaintiff would have had any cause of action against Woor.)

It is not necessary in an action for words to allege that the words were spoken maliciously. If the words themselves be actionable, the law implies malice : *Mercer v. Sparks*.†

(PARKE, J. : That was after verdict, and malice must have been proved at the trial.)

In *Morrison v. Cade*‡ the declaration stated that the plaintiff was a widow, and in communication with the Earl of Kent about her marriage; and the defendant said, "Askot had reported that he had had the use of her body," *ubi revera* he never made any such report; and upon motion in arrest of judgment, it was held that the words were actionable, though spoken by way of report, but that it must be averred that no such report was made.

(PARKE, J. : There it was alleged that Askot never reported. That was equivalent to an allegation that the defendant spoke the words falsely.)

In *Lewes v. Walter*§ it was held that the report of the speech of another, who never used such words, is actionable.

(BAYLEY, J. : The plea must confess, and avoid the cause of action stated in the declaration. The charge in the declaration is, that the defendant spoke words importing an unqualified assertion. The plea shews that Woor spoke those words, and that the defendant spoke the same words, and then added, that he had heard and been told those words by Woor. According

† Owen, 51; Noy, 35.

‡ Cro. Jac. 162.

§ Cro. Jac. 406.

to the plea, *the defendant, therefore, first stated the words of his own authority, and then qualified his expression by alleging that he had heard them from Woor. It does not, therefore, confess the cause of action stated in the declaration.)

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The defendant confesses the cause of action stated in the declaration by shewing that he spoke the words there charged, and then avoids it by shewing that he named the person from whom he heard the words. The principle on which the naming of the first publisher of a libel constitutes a defence is, that the defendant thereby negatives malice. In *Davis v. Lewis*† the fourth resolution in *Lord Northampton's* case was spoken of by Lord KENYON without disapprobation. In *Maitland v. Goldney*‡ the COURT decided that the defendant was not justified in propagating a report which he knew to be false, because he heard it from others. It may be inferred from that decision that the having heard it would have been a justification in an action for repeating it, if the defendant had not known it to be false. In *Rolle's Abr.* 64, the same rule is laid down without qualification. The decision in *De Crespigny v. Wellesley*§ only applies to cases of written slander. There is a material distinction between oral and written slander. In many instances an action may be maintained for slander in writing which could not be maintained if it was spoken.

F. Kelly, contrà, was stopped by the COURT.

BAYLEY, J. :

It seems to me that the plea is bad. The charge in the declaration is, that the defendant *falsely and maliciously spoke and published in the hearing and presence of other persons of and concerning the plaintiff, and of and concerning him in his trade or business of a coach proprietor the false and malicious words, "His horses have been seized from the coach on the road; he has been arrested, and the bailiffs are in his house," thereby meaning and intending that the plaintiff was in bad

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† 4 R. R. 373 (7 T. R. 17).
6 R. R. 466 (2 East, 426).

§ 30 R. R. 665 (5 Bing. 392).

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circumstances, and incapable of paying his just debts. Now that imports an unqualified assertion to have been made by the defendant; and, if he had pleaded the general issue only, it would have been incumbent on the plaintiff to have proved, at the trial, an unqualified assertion made by the defendant to that effect: and if, instead of proving an unqualified assertion by the defendant, the plaintiff had proved only that the defendant had said that Woor had told him that the plaintiff had been arrested, &c. the defendant would have been entitled to a verdict or nonsuit. Here the defendant has pleaded specially. He was bound, therefore, according to the first principles of pleading, to confess the charge he professed to answer, and then to aver some matter as an answer. The charge is, that the defendant made an unqualified assertion, that the plaintiff had been arrested, &c. Unless the plea, therefore, contain an admission by the defendant that he spoke words having that unqualified sense, it is bad. The plea does not admit that the defendant spoke the words in an unqualified sense. It is therefore bad, because it does not confess the charge stated in the declaration. Another objection pointed out by my brother PARKE is, that the plea gives the plaintiff no cause of action whatever against Woor; and that, *according to *Lord Northampton's* case,† a person to justify the repetition of slander, by naming the original author of the slander, must give the party slandered a cause of action against that other. Now here the plea merely states that the words were spoken by Woor, without adding that they were spoken falsely and maliciously. They might have been spoken by Woor upon a justifiable occasion, as by way of a confidential communication to a creditor, or in a court of justice. Woor may have been examined in a court of justice, and the words may have been extracted from him by way of cross-examination. Assuming, therefore, that the defendant might rely on the fact of his having heard the words first spoken by Woor, and of his having named Woor at the time as an answer to his action, still he ought by his plea to have shewn that the words were spoken by Woor under circumstances which did not justify the speaking of them.

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† 12 Co. Rep. 134.

Upon the great point, viz. whether it is a good defence to an action for slander, for a defendant to shew he heard it from another, and at the time named the author, I am of opinion that it is not. *Lord Northampton's* case was undoubtedly mentioned without disapprobation by Lord KENYON, a man of a very powerful mind, acute discrimination, and great learning. But whatever respect I may feel for the memory of that noble and learned Judge, I cannot carry that respect so far as to surrender my own judgment. Look at the terms of the resolution, and try it by the plain principles of reason and common sense. "It was resolved, that if A. say to B., did you not hear that C. is guilty of treason, &c.? this is tantamount to a scandalous publication: *and in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say that J. G. was a traitor or a thief; in an action on the case, if the truth be such, he may justify." Now, assuming that it is not there stated, as a qualified proposition, that a person may justify if he believes the slander to be true, and repeats it on a justifiable occasion; but as a general proposition, if he in truth heard the report, from another, and named that other at the time he uttered the slander, that that is in all cases a justification, I think that is a proposition which cannot be supported. At present, I have very great doubts whether the repetition of slander is in any case lawful, unless the party believe it to be true. By repeating slander, a person, although he state at the time that he heard it from another, gives it a degree of credit; for the repetition of it, imports a degree of belief in the truth of the slander. If I hear another say that A. is a thief, and that B., though a person of bad character, told him so, I am induced to think, that the person who repeats it gives some credit to the statement. It seems to me, therefore, that a person cannot be justified in repeating slander, unless he believes it to be true. But that alone is not sufficient. I think it can only be repeated upon a justifiable occasion. Every publication of slanderous matter is *primâ facie* a violation of the right which every individual has to his good name and reputation. The law, upon grounds of public policy and convenience, permits, under certain circumstances, the publication

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M'PHERSON of slanderous matter, although it be injurious to another. But
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 charged with uttering slander, whether he were the first utterer
 [*271] or not, to shew that he uttered it *upon some lawful occasion.
 Upon the whole, I am of opinion that a man cannot by law
 justify the repetition of slander by merely naming the person
 who first uttered it; he must also shew that he repeated it on
 a justifiable occasion, and believed it to be true.

LITLEDALE, J. :

For the reasons already given by my brother BAYLEY, I think that the plea is bad; but with reference to the resolution in *Lord Northampton's* case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumours, either of the King or of any of the grantees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means they may be published generally." It was resolved then, that in the case of *scandalum magnatum* it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz. the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by shewing that he named his original author, I think that it is not law.

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The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be

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malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law *primâ facie* presumes a consequent damage without proof. In other cases actual damage must be proved. To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or shew that the plaintiff is not entitled to recover damages. It is competent to a defendant, upon the general issue, to shew that the words were not spoken maliciously; by proving that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice, (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment,) but because it shews that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. Now, a defendant, by shewing that he stated at the time when he published *slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not shew that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it shew that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of

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law for injurious matter published concerning him, because another person previously published it. That shews not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it shew that the plaintiff is not entitled to recover damages.

PARKE, J. :

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It is not absolutely necessary to decide in this case whether the latter part of the fourth resolution in *Lord Northampton's* case be good law, because, assuming *the rule there laid down to be correct, this plea is bad for two reasons. To be a good plea it must confess and avoid the cause of action stated in the declaration. But this plea either does not confess, or if it confesses, does not avoid that cause of action. It appears from the case of *Bell v. Byrne*,† that if a defendant has not made an assertion as his own, but has merely alleged that some other person had made it, it must be so averred: and that an averment in a declaration, that the defendant used slanderous words, must be taken to mean, that he used them as his own words, and as a substantive allegation of his own; and will not be supported by proof, that he used them as the words of another person. To apply the principle of that decision to the present case, if the plea be understood to confess that the words were spoken as those of another person, and not as a direct assertion of the defendant himself, it does not properly confess the matter stated in the declaration: if, on the other hand, the plea be considered as confessing the words to have been used as those of the defendant himself, making a substantive allegation of his own, it does not contain any proper avoidance of the matter so confessed: for if one make such assertion of a slander as his own, it can be no answer, even admitting the latter part of the

† 12 R. R. 433 (13 East, 534).

fourth resolution in *Lord Northampton's* case to be law, if in the same conversation he add that some one else has also said the same thing. In the second place, the plea is bad, because it does not give the plaintiff any cause of action against Woor. It does not state that Woor falsely and maliciously *spoke the words; and though malice may be implied from words actionable of themselves, still the defendant ought to have stated in the plea, as he must have done in a declaration against Woor, that the words spoken by Woor were false and malicious.

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But assuming that the plea were not bad for the reasons already mentioned, I am of opinion that the latter part of the fourth resolution in *Lord Northampton's* case cannot be law. In the first place, the 12 Co. Rep. is not a book of any great authority. It is said by Mr. Hargrave† to be of small authority, being not only posthumous, but apparently nothing more than a collection from papers neither digested nor intended for the press by the writer. And Mr. Serjeant Hill, in his copy, refers to fo. 18, 19, as shewing that the 12 Co. Rep. was not fit to be allowed. And HOLROYD, J., in *Lewis v. Walter*,‡ gives an opinion unfavourable to its accuracy. It is to be observed also, that the expressions used in the fourth resolution are equivocal. It is not said in distinct terms, that if the defendant gives a cause of action against another, it will in all cases be an answer to an action for slander: and if it be taken to import a general position, that the repetition of slander is universally lawful, if the party at the time he repeats it mentions the name of the author, I think, that upon no principle can such a position be supported, nor can any satisfactory distinction be made in this respect between oral and written slander. A man's reputation is entitled to the protection of the law, against those slanders which it considers to be injurious; and as every one who publishes such a slander injures that reputation, he is guilty of a *wrongful act, and upon principle is liable in a civil action for any damage arising to another by reason of that wrongful act. I agree with what is said by Lord Chief Justice BEST in *De Crespigny v. Wellesley*: § “because one man does an unlawful act to any person another is not to be

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† 11 St. Tr. 30.

§ 30 R. R. at p. 676 (5 Bing. 404).

‡ 23 R. R. 415 (4 B. & Ald. 605).

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permitted to do a similar act to the same person. Wrong is not to be justified, or even excused, by wrong." A man does a wrong by, and is therefore liable to an action for, every repetition of slander; and if that be so, is the repeating of the slander less a wrong because the person who repeats it is not the same who first uttered it? There may be a great difference in the degree of injury committed, arising from the character or condition of the party who utters the slander, or the number of persons in whose presence it is uttered. The person who first uttered the slander may be a person of no character, or may have been in a state of intoxication at the time when he uttered it. Slander uttered by such a person, or under such circumstances, would not receive much attention; but if a person of good character, and in a sound state of mind, were afterwards to repeat that slander, he would thereby not only circulate it more widely, but he would give credit to it by the mere repetition of it, although he stated at the time that he heard it from another. Every wrong to property is the subject of a civil action. Upon what principle can it then be said that a wrong done to the good name and reputation of another is not equally so? It is clear that a wrong to property cannot be justified by alleging that another person has before committed a similar wrong. In this case, too,

[*277] the plaintiff alleges, *that in consequence of the words spoken by the defendant, he sustained a special damage, by the loss of a customer, and *non constat*, that any such special damage would have arisen from the words originally spoken if they had not been repeated by the defendant. It is therefore clear that the plea is bad, and the judgment of the Court must be for the plaintiff.

Judgment for plaintiff.

1829.
Dec. 14.

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VERE AND OTHERS v. R. S. ASHBY, H. R. ROWLAND,
AND B. SHAW.

(10 Barn. & Cress. 288—298; S. C. 8 L. J. K. B. 57; Lloyd & Welsby, 20.)

On the 24th of June, 1824, C. agreed to become a partner with A. and B., the business to be carried on in the names of A. and B. for the benefit of A., B., and C.; that the partnership should be considered as commencing on the 18th of May preceding. Before the 24th of June A.

and B. had opened an account with certain bankers, which was continued in their names till the 21st of September, when the partnership as to B. was dissolved. All the business with the bankers was transacted by B., and the bankers did not know that C. was a partner till the account was closed. B. used the account for the purposes of the firm of which C. was a member, as well as for other matters. On the 21st of May he indorsed a bill of exchange in the partnership names of A. and B. to the bankers, who discounted it, and placed it to the credit of the account. On the 13th of July he indorsed two others in a similar manner: Held, that as the bankers did not know that the money raised by these bills was intended to be applied to other than partnership purposes, C. was liable on the last two bills, but not on the first, he not having been an actual partner at the time when it was discounted.

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ASSUMPSIT for the amount of three bills of exchange and a cash balance claimed to be due to the plaintiffs, bankers in London, from the defendants, who were partners together for the period of time after-mentioned, in the business of engravers, printers, and stationers in Lombard Street. The plaintiffs declared as indorsees, against the defendants, as indorsers of three bills of exchange, one for the sum of 125*l.* 16*s.* 6*d.*, dated the 19th of May, 1824, payable four months after date; another for 148*l.* 15*s.*, dated the 8th of July, 1824, payable three months after date; and the third for 167*l.* 0*s.* 6*d.*, dated the 10th of July, 1824, payable three months after date, with the usual money counts. The defendant Shaw pleaded *non assumpsit*. The defendant Ashby pleaded bankruptcy, which was admitted, and as to him a *nolle prosequi* was entered. The defendant Rowland suffered judgment by default. At the trial before Lord Tenterden, Ch. J. at the London sittings after Hilary Term, 1827, a general verdict was found for the plaintiffs, damages 557*l.* 13*s.*, subject to the opinion of this Court on the following case:

Previous to the 18th of May, 1824, the defendants Ashby and Rowland carried on the business of engravers, *printers, and stationers in Lombard Street, in partnership with one Osborne, under the firm of Ashby, Osborne, and Rowland, but on that day the partnership was dissolved by Osborne retiring, and the stock, debts, and effects of the partnership became the property of Ashby and Rowland, who continued to carry on the business in partnership, under the firm of Ashby and Rowland until the 24th of June, 1824, when the defendant Shaw entered into

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partnership with the defendants, Ashby and Rowland, and by an agreement then made, signed by them, reciting that the said R. S. Ashby and the said H. R. Rowland were then carrying on the trade and business of engravers, printers, and stationers, at No. 56, Lombard Street, under the name and firm of Ashby and Rowland; and the said R. S. Ashby and H. R. Rowland being desirous of enlarging the capital they then had in the said trade, for the purpose of increasing the profits and advantages thereof, had proposed to the said B. Shaw to take him into partnership; it was therefore thereby agreed by the said parties, that Shaw should advance, as his capital in the said business, 1,500*l.*, viz. 500*l.* on his then entering into the agreement, 700*l.* on the 6th of August, and the remainder, 300*l.*, on the 6th of September then next, making together the sum of 1,500*l.* as his capital stock in the said trade; that Ashby should advance in stock or money 300*l.* as his share of the capital stock; and H. R. Rowland should advance in stock or money 1,500*l.* as his share of the capital stock, making together 3,300*l.* as the capital in the said trade; that the trade or business should be carried on in the names of Ashby and Rowland, and all bills or bills of parcels, drafts for money and securities for money, should be in the names of Ashby and Rowland, and all *acceptances of bills or notes should be accepted by the said R. S. Ashby or H. R. Rowland, or one of them, in the name of Ashby and Rowland; that the partnership should be considered as commencing on the 18th day of May then last, being the day on which the partnership of Ashby, Osborne, and Rowland was dissolved as it respected the said Richard Osborne only. The agreement then provided for the division of the profits, &c. The business was carried on in pursuance of this agreement, in the names of Ashby and Rowland only, until the 21st of September, 1824, when the partnership was dissolved so far as regarded the defendant Rowland. The business was then carried on by the defendants Ashby and Shaw, who took the stock and effects of the partnership of Ashby, Rowland, and Shaw. Shaw never appeared in the business, nor was he introduced or known to the plaintiffs, nor even to the clerks of the partnership business as a partner; he was abroad from the commencement of the

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partnership until about the time when the dissolution thereof took place.

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Some short time before Mr. Shaw became a partner, Ashby and Rowland had opened an account in their own names with the plaintiffs, which account was continued in the names of Ashby and Rowland, without any rest made therein, or any other alteration thereof, down to the time of the dissolution of the partnership, as Ashby, Rowland, and Shaw; the plaintiffs having no notice that Shaw was a partner until the dissolution, when they received the following letter, signed by Ashby and Shaw, dated the 21st of September, 1824: "GENTLEMEN, Mr. H. R. Rowland having withdrawn from the firm of Ashby and Rowland, you will please to take notice, that from this date no transaction to which he is a party can be recognized *by us." The account so opened by Ashby and Rowland with the plaintiffs commenced on the 29th of April, 1824, and ended on the 22nd of September of that year, when the gross amount of the debtor side of the account was 13,993*l.* 14*s.* 8*d.*, and of the creditor side 13,933*l.* 9*s.* 5*d.*, leaving a cash balance of 60*l.* 5*s.* 3*d.* due to the plaintiffs. The three bills of exchange declared upon were indorsed "Ashby and Rowland," in the handwriting of the defendant Rowland, and had been paid to the plaintiffs by him, and discounted by them, and the proceeds carried to the account standing in the names of "Ashby and Rowland" generally. The bill for 125*l.* 16*s.* 6*d.* was discounted by the plaintiffs on the 21st of May, 1824, and the other two bills were discounted by them on the 13th of July in the same year. The transactions at the banking-house were with Rowland personally. Neither Parr, John Shaw, nor Barnard, (the parties to the bills,) had any transactions with the house of Ashby and Rowland. The account was overdrawn at the close 60*l.* 5*s.* 3*d.* by means of placing a bill for 48*l.* 17*s.* 4*d.*, dated the 19th of May, 1824, to the debit of the defendants, credit being given for the three bills in question. The bill for 48*l.* 17*s.* 4*d.* was discounted by the plaintiffs on the 21st of May, 1824, and the proceeds carried to the account of Ashby and Rowland. The defendants Ashby and Rowland were the liquidating partners of the dissolved firm of Ashby, Rowland, and Osborne. During the partnership of Ashby, Rowland, and Shaw, Messrs.

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Rogers & Co. were the private bankers of the defendant Shaw, and on the 28th of June, 1824, four days after the partnership of Ashby, Rowland, and Shaw commenced, a bill for 300*l.*, accepted by the defendant Shaw, payable at *Messrs. Rogers & Co., dated the 24th of June, 1824, was discounted by the plaintiffs, and carried to the account of Ashby and Rowland, in whose names it was indorsed by Rowland, and when due the amount was paid by Rogers & Co. to the plaintiffs. On the 24th of June, 1824, when the agreement of copartnership between Ashby, Rowland, and Shaw was made, the amount of the debtor side of the account of Ashby and Rowland with the plaintiffs was 6,752*l.* 5*s.* 8*d.*, and of the creditor side 7,618*l.* 5*s.* 9*d.*, being, if the balance were struck, in favour of Ashby and Rowland of 866*l.* 0*s.* 1*d.* During the partnership of Ashby, Rowland, and Shaw, the account with the plaintiffs was used by the defendant Rowland for the general purposes of the late firm of Ashby, Osborne, and Rowland, for the private purposes of the defendant Rowland, and cheques were drawn by Rowland for the payment of wages to the workmen employed in the partnership business of Ashby, Rowland, and Shaw, and other persons to whom the firm was indebted. The defendant Rowland, during the continuance of the account with the plaintiffs, drew out from time to time considerable sums, which he applied to his own private uses and the use of his father, and he frequently paid his father's money to the plaintiffs, to the credit of the account standing in the names of Ashby and Rowland, and paid his father's debts by cheques drawn by him upon the plaintiffs, in the name of Ashby and Rowland. Of this, however, the plaintiffs had no knowledge. The bills declared upon were duly presented, and dishonoured, of which due notice was given. The question for the opinion of the Court was, whether, under the above circumstances, the defendant *Shaw was liable to the whole or any part of the plaintiffs' demand?

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The Court called upon

F. Pollock for the defendants:

Generally speaking, partners are bound by what is done by each other in the course of the partnership business. Here the

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bills were indorsed by Rowland alone, and not for the purposes of the firm in which Shaw was a partner. That was, therefore, a fraud upon Shaw.

(BAYLEY, J. : It is not stated that the proceeds of the bills were not applied by Rowland to partnership purposes.)

The prior parties to the bills were persons not connected with the firm of Ashby and Rowland. It lies on the plaintiffs to shew that they were so applied. Shaw clearly is not liable upon the first bill, for when it was discounted he had not become an actual partner, and, therefore, was not liable to third persons. As to the other two bills, at the time when they were discounted Shaw was a secret partner in a firm in which the ostensible partners were Ashby and Rowland. Shaw, therefore, would be liable on all bills indorsed by either of his co-partners in the partnership name for the purposes of the firm. In *Emly v. Lye*,† it was held that the indorsement of one partner could not be treated as the indorsement of the firm, so as to render all the partners liable, although the money thereby raised was applied to partnership purposes.

(PARKE, J. : The case of *The South Carolina Bank v. Case*‡ shews that if a firm consisting of several carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing *the firm.)

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The account kept by the plaintiffs in the partnership name, was used by Rowland for three distinct purposes. Suppose there had been two distinct firms trading under different names, and that Shaw was a partner in one only, and that the accounts had been mixed up together, he would not be liable for sums paid by the bankers for the firm in which he was not a partner. A secret partner is liable not merely because he authorizes the use of the partnership name, but because he shares in profit and loss. The account with the bankers was opened before Shaw became a partner, and the plaintiffs by using due diligence might have

† 13 R. R. 347 (15 East, 7).

‡ 32 R. R. 433 (8 B. & C. 427).

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learnt the purposes for which the monies advanced by them were applied. They did not trust Shaw, and that being so, it is incumbent on them to shew that the money was applied to partnership purposes. This case is distinguishable from *Swan v. Steele*.† There the bill was taken in the course of the business of the firm in which the secret partner was concerned, and it was indorsed with reference to that business, though for the benefit of another.

Wightman, for the plaintiffs :

When Shaw joined the partnership, the balance of the account was in favour of the firm.

(BAYLEY, J. : In *Baker v. Charlton*‡ it was decided, that where persons are partners in a particular and single transaction only, and not general partners, they are not liable even to a *bonâ fide* holder on a bill issued by one of them in relation to a different concern.)

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In this case the bankers were not aware that the money advanced by them upon the bills was to be applied to any other purposes than those of the firm of Ashby and *Rowland, and it does not distinctly appear that it was so applied. At the time when the last two bills were discounted, Shaw was a partner in that firm. He had, therefore authorized his copartners to bind him, by drawing, indorsing, or accepting bills of exchange. *Swan v. Steele*† is an express authority to shew that he is liable. Lord ELLENBOROUGH there says, “that in the absence of fraud on the part of the indorsee, an indorsement by one partner will bind all the partners.” The argument on the other side would go to shew that Shaw, even if he were an ostensible partner, would not be liable.

(BAYLEY, J. : Each partner might have limited the authority of his copartners by giving due notice to the bankers.)

A sale to one partner is a sale to the partnership, with whatever view the goods may have been bought, and to whatever purpose

† 8 R. R. 618 (7 East, 210).

‡ 1 Peake, N. P. 111.

they may be applied, (and even though the purchasing partner meant to cheat his copartners,) and all the partners are liable to the vendor for the price of the goods : *Bond v. Gibson*.† As to the bill indorsed before the 24th of June, it is true, that at the time of such indorsement Shaw had not given any authority to Rowland to indorse bills for him, but by afterwards agreeing to become a partner from the preceding 18th of May, he adopted and ratified the acts done by either of his copartners in the intervening period, and is therefore as much bound by them as if he had given a previous authority.

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BAYLEY, J. :

The question in this case was, whether Shaw was liable? He became a partner on the 24th of June, it being agreed between him and his copartners that he was to be considered a partner from the 18th of *May preceding, but his name was not to appear in the firm; he in fact continued a partner till the 21st of September. The action was upon three bills of exchange discounted by the plaintiffs, who were bankers of Rowland and Ashby; one between the 18th of November and the 24th of June; the two others on the 13th of July, when Shaw was clearly a partner. The question was, whether Shaw was liable? The general rule is, that where the partnership name is pledged, any person who is either an actual partner, or has allowed himself to be held out to others as a partner, is liable, unless the party to whom the partnership credit is pledged is privy to an intent to misapply the money. Here there was no ground for imputing any such knowledge to the plaintiffs. If it be true that persons who are actually partners, are made liable by a pledge of the partnership name, the only question is, who were partners at the time when the partnership name was pledged? Ashby, Rowland, and Shaw were the persons, though they traded under the firm of Ashby and Rowland. Shaw was actually a partner in a firm assuming a particular name with his assent. The cases of *Swan v. Steele*‡ and *Baker v. Charlton*§ go further than it is necessary to go for the purpose of deciding the present case. But applying the principle I have mentioned

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† 10 R. R. 665 (1 Camp. 185).

§ 1 Peake, N. P. 111.

‡ 8 R. R. 618 (7 East, 210).

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to this case, there can be no doubt that the plaintiffs are entitled to recover to a limited extent. The first bill was discounted, and the credit of the firm pledged at a time when Shaw was not an actual partner, and the same observation applies to the bill for 48*l.* 17*s.* 4*d.* in the cash account. And although it was afterwards agreed *that he was to be considered a partner from a preceding day, that was a bargain between himself and his partners, and made no pledge of his credit to the plaintiffs. The other bills having been discounted at the time when the three defendants were partners, the plaintiffs are entitled to recover the amount of them against all the three.

LITLEDALE, J. :

If a person be an actual partner, or, with his assent, be held out to others as a partner, he is liable. Here Shaw was an actual partner. By the agreement he gave an authority to the two to use their names as representing him. By virtue of that authority, Ashby and Rowland then became, in all matters relating to the partnership, the same as Ashby, Rowland, and Shaw. The plaintiffs advanced money for the use of the partnership. Shaw, therefore, is liable. But it is said that it was never intended to apply the money given for these bills to the partnership accounts; but of that intention the plaintiffs had no knowledge. The plaintiffs are not entitled to recover upon the first bill, because Shaw was not a partner at the time when that bill was discounted. On the others they are entitled to recover.

PARKE, J. :

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I am of the same opinion. The three defendants are not liable on the first bill; they are on the second and third, and for so much of the cash balance as became due after the 24th of June. The question is with whom the plaintiffs contracted, and that depends on this. For whom was Rowland authorized to make a contract? There is no question in this case as to an apparent authority as distinct from a real one. The only question is, therefore, by what persons was *authority given to Rowland to contract. On the 24th of June the agreement for the partnership was made. The effect of that agreement is that Shaw gives

to Ashby and Rowland respectively authority to use their names for the three in all dealings and matters in respect of which partners in such a trade usually have authority to bind one another. If the name of the firm had been used in other transactions out of the usual scope of dealing of such a partnership, that user of the name would not have bound Shaw. It would make no difference in this case that the money had been misapplied, it not appearing that there were any circumstances to excite the plaintiffs' suspicion that it was intended to be so misapplied. As to the two bills, therefore, which were discounted after the 24th of June, Shaw is liable. As to the other I am of opinion he is not liable. The rule as to ratification applies only to the acts of one who professes to act as the agent of a person who afterwards ratifies. Here Rowland at the time when the first bill was discounted, did not profess to act as the agent of Shaw. The retrospective date of the partnership may affect the accounts between the partners, but not the rights of third persons.

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Postea to the plaintiffs.

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(10 Barn. & Cress. 299—316; S. C. 5 Man. & Ry. 235; 8 L. J. K. B. 126.)

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An incumbent of a living is bound to keep the parsonage-house and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; but he is not bound to supply or maintain anything in the nature of ornament, such as painting (unless that be necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle.

ACTION on the case by the plaintiff, as rector of the church of the parish of Barley, in the county of Hertford, against the defendant, as the executor of the late rector, William Metcalfe, the immediate predecessor of the plaintiff, to recover the amount of the dilapidations of the rectory-house, barns, stables, and out-buildings thereto belonging, of the said rectory, and of the chancel of the said church, which had arisen at the time of the death of the said William Metcalfe. At the trial before Garrow, B. at the

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Summer Assizes for Hertford, 1828, the jury found a verdict for the plaintiff, damages 399*l.* 18*s.* 6*d.*, subject to the opinion of this Court upon the following case:

The deceased, William Metcalfe, became rector of the church of the said parish in 1814, and soon afterwards received from the personal representative of his immediate predecessor, the sum of 115*l.*, being the amount of the dilapidations of the rectory-house, outbuildings, and chancel, at the death of his said predecessor. Mr. Metcalfe continued to be rector until his death, which happened on the 16th of May, 1827, at which period the annual value of the said rectory was 600*l.*, out of which the sum of 46*l.* was payable annually for land-tax. In the month of July, 1827, the plaintiff became the rector of the church of the said parish, and has so continued ever since. The rectory-house is an ancient structure, built with timber, and plastered on the outside, and has upon it the date of *1624. The barns were also old, but not of equal age with the rectory-house. The dilapidations of the rectory-house, barns, stables, outbuildings, and of the chancel of the church, amounted to 399*l.* 18*s.* 6*d.*, provided the principle upon which the estimate had been made was correct. The principle was, that the former incumbent, William Metcalfe, ought to have left the rectory-house, buildings, and chancel, in good and substantial repair; the painting, papering, and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings which were to be restored where necessary, according to their original form, without addition or modern improvement. It was proved by the several surveyors of experience examined on the part of the plaintiff, and also of the defendant, that they had invariably estimated the dilapidations between the incumbent of a living and the representatives of his predecessors upon the above principle.

If, however, the rectory-house, buildings, and chancel were to be repaired in the same manner only as buildings ought to be left by an outgoing lay tenant, who is bound by covenant to leave them in good and sufficient repair, order, and condition, the expense of such reparations amounted to 310*l.*, the painting,

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papering, and whitewashing not being included in the last estimate.

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And if the former incumbent, William Metcalfe, was only bound to leave the rectory-house, buildings, and chancel, wind and water tight, or in that state of reparation which an outgoing lay tenant of premises not obliged by covenant to do any repairs, ought to leave them, then the expenses of repairing the rectory, buildings, and chancel amounted to 75*l.* 11*s.*

The question for the determination of the Court is, which of the above principles of valuation is the correct one; and according to their decision the damages will stand for 399*l.* 18*s.* 6*d.*, or be reduced either to 310*l.* or to 75*l.* 11*s.* The case was argued on a former day during these sittings, by

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Brodrick, for the plaintiff. * * *

Thesiger, *contra*. * * *

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Brodrick, in reply. * * *

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Cur. adv. vult.

BAYLEY, J. now delivered the judgment of the COURT :

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This was an action for dilapidations by the successor against the executor of the deceased rector; and the question was, by what rule the dilapidations as to the rectory-house, buildings, and chancel, were to be estimated? Three rules were proposed for our consideration. First, that the predecessor ought to have left the premises in good and substantial repair, the painting, papering, and whitewashing being in proper and decent condition for the immediate occupation and use of his successor, and that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored where necessary, according to their original form, without addition or modern improvement, and the estimate according to this rule came to 399*l.* 18*s.* 6*d.*

The second rule proposed was, that they were to be left as an outgoing lay tenant ought to leave his buildings where he is under covenant to leave them in good and sufficient repair, order, and condition, and the estimate by that rule was 310*l.*, the papering, painting, and whitewashing not being included.

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The third rule was, that they were to be left wind and water tight only, or, as the case expresses it, in such condition as an outgoing lay tenant, not obliged by covenant to do any repairs, ought to leave them, and by that rule the estimate would be 75*l.* 11*s.*

We are not prepared to say that any of these rules are precisely correct, though the second approaches the most nearly to that which we consider as the proper rule.

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The law and custom of England, or, in other words, the common law, as stated in some of the earliest precedents, *p. 12 & 13 Hen. VIII. Rot. 126, C. B., and others which we have searched, and in 1 Lutw. 116, is as follows : “ Omnes et singuli prebendarii, rectores, vicarii, &c. pro tempore existentes, omnes et singulas domos, et edificia, prebendariorum, rectoriarum, vicariarum, &c. *repararare et sustentare*, ac ea successoribus suis, reparata, et sustentata, dimittere, et relinquere teneantur, et si hujusmodi prebendarii, rectores, vicarii, &c., hujusmodi domus, et edificia, successoribus suis, ut premittatur, reparata et sustentata, non dimisserint, et reliquerint, sed ea irreparata et dilapidata permiserint, eidem prebendarii, &c. in vitis suis, vel eorum executores, sive administratores, &c. post eorum mortem, successoribus prebendariorum, &c. tantam pecuniæ summam, quantam pro *reparatione, aut necessariâ reedificatione* hujusmodi domorum, et edificiorum expendi aut solvi sufficiet satisfacere teneantur.” An averment in terms nearly similar has been usually introduced into all declarations on this subject.

From this statement of the common law, two propositions may be deduced : first, that the incumbent is bound, not only to repair the buildings belonging to his benefice, but also to restore and rebuild them if necessary. Secondly, that he is bound only to repair, and to sustain, and rebuild when necessary. Both these rules are very reasonable, the first, because the revenues of the benefice are given as a provision, not for a clergyman only, but also for a suitable residence for that clergyman, and for the maintenance of the chancel : and if by natural decay, which, notwithstanding continual repair, must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally

consistent with *reason, in requiring that which is useful only, not that which is matter of ornament or luxury.

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It follows, from the first of these propositions, that the third mode of computation proposed in the case cannot be the right one, because a tenant, not obliged by covenant to do repairs, is not bound to rebuild or replace. The landlord is the person who, when the subject of occupation perishes, is to provide a new one if he think fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for, papering, whitewashing, and such part of the painting as is not required to preserve wood from decay, by exposure to the external air, are rather matters of ornament and luxury, than utility and necessity.

The authorities which have been cited from the canon law, are in unison with that which we consider to be the rule of the common law.

The earliest provision on this subject is the provincial constitution of Edmund, Archbishop of Canterbury, passed A.D. 1236, 21 Hen. III. It is in the following terms: “*Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas, vel ruinosas; de bonis ejus ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandum hæc, et ad alios defectus ecclesiæ supplendos.*” That constitution, therefore, directs the repairing “*domos ecclesiæ dirutas vel ruinosas.*” And Lindewood’s commentary upon the word “*ad reparandum*” is, “*Scilicet diruta vel ruinosas. Et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ; ut scilicet, impensæ sint necessarie non voluptuosæ.*” The next authority cited from the canon law was the following legatine constitution *of Othobon, promulgated A.D. 1268, 52 Hen. III., “*Improbam quorundam avaritiam prosequentes, qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant, domos ipsarum, et cætera ædificia negligunt, ita ut integra ea non conservent, et diruta non restaurent;*” that is the imputation against the clergy. The constitution then goes on: “*Statuimus et præcipimus ut universi clerici suorum beneficiorum domos, et cætera ædificia prout indiguerint reficere studeant condecenter, ad quod per episcopos suos vel archidiaconos solícite moneantur. Cancellis etiam ecclesiæ per eos qui*

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ad hoc tenentur refici faciant, ut superius est expressum. Archiepiscopus vero et episcopus, et alios inferiores prælatos, domos et ædificia sua sarta tecta, et in statu suo conservare et tenere, sub divini judicii attestazione præcipimus, ut ipsi ea refici faciant, quæ refectione noverint indigere.”

The statute 13 Eliz. c. 10 speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidation as hath happened by his fact and default. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The 57 Geo. III. c. 99, s. 14, enacts, that a non-resident spiritual person shall keep the house of residence in good and sufficient repair; and directs, that if it be out of repair, and remain so, the parson is to be liable to the penalties of non-residence, until it is put into good and sufficient repair to the satisfaction of the Bishop. *There is nothing, either in the authorities cited from the canon law, or in these Acts of Parliament, to shew that the obligation of an incumbent to repair is other than that which I have already stated the common law threw upon him; viz. to sustain, repair, and rebuild when necessary.

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Upon the whole, we are of opinion the incumbent was bound to maintain the parsonage (which we must assume upon this case to have been suitable in point of size, and in other respects, to the benefice,) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding, when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing and papering belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same if the terms “order and condition” are meant, as they most likely are, not to include matters of ornament or luxury.

It was afterwards referred to the Master to calculate the damages upon this principle, and to report for what the judgment should be entered up, and he directed it to be for 369*l.* 18*s.* 6*d.*, and for that sum there was

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Judgment for the plaintiff.

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(10 Barn. & Cress. 317—328; S. C. 5 Man. & Ry. 264; 8 L. J. K. B. 243.)

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An entry made by a deceased collector of taxes in a private book, kept by him for his own convenience, whereby he charged himself with the receipt of sums of money: Held, in an action on a bond conditioned for the due payment of the taxes by the collector, to be evidence against a surety of the fact of the receipt of the money upon the general principle that the entry was to the prejudice of the party who made it.

DECLARATION stated that the defendant in the lifetime of Thomas Squire, deceased, (who was the collector for the second part of the Bishop's liberty appointed by the commissioners acting for the second division of East Brixton in the county of Surrey, in execution of certain Acts of Parliament, passed in the forty-third, forty-eighth, fifty-second, and fifty-ninth years of Geo. III. and the first, second, and third years of Geo. IV. relating to the duties under the management of the commissioners for taxes,) on the 10th of October, 1825, as surety for Squire as collector of taxes, by his certain writing obligatory, became bound to the plaintiffs in the sum of 3,226*l.*, the same being a sum equal to the amount of the whole duty and sums of money (including compositions under the Act of the 3 Geo. IV.) assessed, and to be collected by Squire as such collector, and that the bond was subject to a condition; which condition, after reciting that Squire had been appointed collector of the rates and duties granted by the above-mentioned Acts of Parliament, and that one of the duplicates of assessment and of the abstracts of such of the said rates and duties as had been compounded for under the fifty-ninth Geo. III., had been delivered to Squire with warrants for collecting the same, and that Squire had been required by the plaintiffs to give security in pursuance of the first-mentioned Act (43 Geo. III.), was, that if Squire and the defendant and John Frost, or either of them, should pay, in pursuance of the direc-

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tions of *the said statutes, all such sums of money assessed and to be collected in the said second part of the Bishop's liberty, by Squire as such collector; and if Squire should duly enforce the powers of such acts against such as should make default, then the bond was to be void, otherwise to remain in full force. Breach, that Squire collected large sums of money on account of the rates and duties granted by the said several Acts of Parliament, but that he Squire and John Frost and the defendant in the lifetime of Squire did not pay, nor had John Frost, or the defendant, since the death of Squire, duly paid, the said sums of money collected by Squire, or any part thereof. Plea, that Squire in his lifetime paid the sums collected by him, and upon that issue was joined. At the trial before Alexander, C. B., at the Spring Assizes for the county of Surrey, 1829, it appeared that the defendant, together with John Frost and Squire, had executed the bond stated in the declaration; that a duplicate assessment had been delivered to Squire, in which he occasionally made entries of the sums received from the persons assessed: from the entries made in that assessment, it did not appear that he had received any monies that he had not paid over to the commissioners. It appeared also that for his own convenience he kept a private book, containing entries (copied from the duplicate assessment) of the names of the persons, and of the sums for which they were respectively assessed, and that it was his usual habit to collect by that private book, and to mark with ticks all the sums he received from the several persons therein mentioned. This book was inspected by John Howard and W. Sefton on the day after Squire's death. They stated that they found in it entries with ticks against them, denoting the sums received from the *persons against whose names those ticks were placed, for which there were not corresponding entries in the duplicate assessment. It was proved that the private book was delivered by Squire's daughter to the defendant, and that the defendant had had notice to produce it. The sums which appeared to be due from Squire by the entries he himself had made in the private book, over and above what appeared by the duplicate assessment to have been collected by him, amounted to 996*l.*; for some of these sums the plaintiff further produced receipts given

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to several persons for taxes paid to Squire, and signed by him. It was objected, first, that the receipts were not receivable in evidence, because the parties who paid the money might have been called ; and, secondly, that although entries made by Squire in any book which he in the course of his duty as collector was bound to keep would be evidence against the surety, yet that entries made by him in a private book kept for his own convenience were not receivable in evidence to charge the surety. The learned Judge received the evidence, but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that neither the entries in the private book nor the receipts were evidence, or to reduce the verdict, if they should be of opinion that the entries in the private book were not admissible in evidence, but that the receipts were. A verdict having been found for the plaintiff for 996*l.* a rule *nisi* had been obtained pursuant to the leave reserved.

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Andrews, Serjt. and *Hutchinson* now shewed cause :

The entries in the private book of the deceased collector were declarations made by him against his interest, *for he thereby charged himself with the receipt of certain sums of money, which he was bound by law to pay over to other persons. The entries were therefore admissible in evidence on the ground that they were made by an individual cognizant of a fact not in dispute, and who at the time when they were made had no interest in making false entries, and that they tended to charge himself. And if the entries in the private book were evidence, they were sufficient to entitle the plaintiffs to recover the full amount found by the jury. The receipts were admissible in evidence for the same reason.

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Spankie, Serjt. and *Chitty*, *contra* :

The question is, whether the entries made by Squire in his private book, if that book had been produced, would have been admissible against the defendant, a surety ? If they were entries made by the principal in the regular course of that duty for the performance of which the defendant as surety had become responsible, they would have been admissible according to *Goss*

MIDDLETON v. *Watlington*,† and *Whitnash v. George*;‡ but in this case, the entries were made in a book which the principal was not under any obligation, in discharge of his duty, as tax collector, to keep. The defendant when he became a surety undertook that Squire should faithfully discharge his duty. His duty was to make entries of the monies received by him in the public book, on the duplicate assessment, and such entries would have been evidence against the surety; but when there are no entries in the public book, the presumption is that he had not received the monies. Here the entries in the public book do not shew that Squire had received any monies *which he had not paid over. Entries made by a principal for his own purposes might have been evidence against the principal himself, but are not to charge a surety. The best evidence should be produced. *Cutler v. Newlin*§ shews that an admission by a principal is not, while he is alive, sufficient to charge a surety. In *Goss v. Watlington*† the entry was made in a book in which the party was bound to make entries. There is no case in which a mere admission of a principal has been held to be evidence to charge a surety even after the death of the principal. Then as to the receipts, they were not receivable in evidence. The parties who made the payments ought to have been called. Besides, here the bond was given pursuant to the provisions of an Act of Parliament. If the commissioners had done their duty, there would have been no difficulty. They are required to call the collectors before them, and examine them upon their oaths as to the monies collected by them. The book in this case is a mere copy of the duplicate assessment; and the only evidence to fix the defendant is, that ticks were made by Squire in his lifetime in that book. They might have been made by him not to denote that he had received the money, but to denote that he expected it to be paid.

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BAYLEY, J. :

The question in this case is, whether a private book kept by a collector of taxes, containing entries wherein he acknowledges the receipt of sums of money in his character of collector, can be

† 3 Brod. & Bing. 132.

§ Manning's Digest, 137.

‡ 8 B. & C. 556.

given in evidence against a surety, the collector having been appointed to collect the taxes mentioned in the bond pursuant *to the provisions of an Act of Parliament. In this case Squire was the collector, and his private book was found after his death, and given by his daughter to the defendant. There was evidence to shew, therefore, that it was left in the defendant's possession, and he having refused to produce it at the trial after notice, secondary evidence of its contents was admissible. It was proved that it was the collector's usual habit to collect by his private book, and to mark the sums he received with ticks, and that those ticks denoted that those sums had been received by him. If the entries mentioned in the book were admissible evidence to shew that he received those sums, they will be sufficient to entitle the plaintiff to retain the verdict for the full amount; and the question as to the admissibility of the receipts will not necessarily arise. It was contended, on the part of the defendant, that the entries in the book were not receivable in evidence, on the ground that it was a mere private book, which it was not the duty of Squire in his character of collector to keep; and it was said that the cases of *Goss v. Watlington*† and *Whitnash v. George*‡ proceeded on the ground that the entries were in those very books, which, by the condition of the bond, the principal was bound faithfully to keep. The principle there laid down was quite sufficient for the purpose of deciding those cases. But the book in which the entries were made in this case being one which the collector was not under any obligation to keep, it now becomes necessary to consider whether the rule established by those cases is not too narrow, and whether such entries made in this private book may not be evidence against this defendant, *considering the defendant as a mere stranger, without reference to his character of surety, in respect of which he may be identified in interest with his principal. The question then is, whether such an entry, made by an individual against his own interest, may be evidence of the fact of the receipt of the money against a third party? It is a general principle of evidence, that declarations or statements of deceased persons are admissible when they appear to have been made against their interest. An

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† 3 Brod. & Bing. 132.

‡ 8 B. & C. 556.

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entry in a book, whereby the party making it charges himself with the receipt of money on account of a third person, or acknowledges the payment of money due to himself, has been held to be evidence of the receipt or payment of such money. The case of *Warren v. Greenville*[†] is a very early authority upon this subject, and it does not appear to have been cited in the case of *Goss v. Watlington*.[‡] There, upon a trial at bar in 1740, the lessor of the plaintiff claimed, under an old entail in a family settlement, by which part of the estate appeared to be in jointure to a widow at the time her son suffered a common recovery, which was in 1699, and the defendants not being able to shew a surrender of the mother's estate for life, it was insisted that there was no tenant to the præcipe for that part, and that the remainder, under which the lessor claimed, was not barred. On the other hand it was said, that at that distance of time a surrender should be presumed; and to fortify this presumption, the defendant offered to produce the debt-book of Mr. Edwards, an attorney, long since deceased, in which there was a charge of 32*l.* for suffering the recovery; two articles of which were, for drawing a surrender *of the mother, 20*s.*, and for ingrossing two parts thereof, 20*s.* more, and it appeared by the book that the bill was paid. And this being objected to as improper evidence, the Court was of opinion to allow it; for it was a circumstance material upon the inquiry into the reasonableness of presuming a surrender, and could not be suspected to be done for this purpose; that if Edwards was living he might undoubtedly be examined to it, and this was "now the best evidence. And it was accordingly read." Now the principle upon which that case was decided was, that upon looking at the attorney's book, it appeared that he had made a charge for the surrender, and acknowledged that he had been paid the sum charged. In *Stead v. Heaton*,[§] an entry made by the officers of one township of the receipt of a proportion of the church-rates from the officers of another township, was held to be evidence to charge the latter officers with the same proportion in future; and another entry explaining the proportions, made on the same page, was

[†] 2 Str. 1129.

[§] 4 T. R. 669.

[‡] 3 Brod. & Bing. 132.

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also held admissible. There ASHHURST, J. says, "The last entry of the payment by the officers is clearly admissible, because the officers thereby charge themselves with the receipt." In *Barry v. Bebbington*,† the right to the soil was in issue, and the plaintiff, who derived title under Lord Barrymore, offered in evidence several items contained in a book in the handwriting of one Ashley, who had many years ago been steward to Lord Barrymore, and was then dead. The items were memoranda of receipts of money by Ashley from different persons by name, but whose situations were not mentioned, for trespasses committed *on the common in question, paid on account of Lord Barrymore. The evidence was rejected, and a rule was obtained for a new trial on the authority of *Warren v. Greenville*,‡ on the ground that the evidence was improperly rejected; and that rule was afterwards made absolute. Lord KENYON there says: "It is clear that where a steward charges himself with the receipt of money, it shall be received in evidence before a jury, to shew that such sum was received by him." In *Higham v. Ridgway*,§ an entry made by a man midwife in a book of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, was held to be evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. These cases establish that where a person makes an entry charging himself with the receipt of a sum of money, that entry is evidence of the fact of the receipt of that money against a third person. The question as to the receipts then becomes immaterial. But if the entries in the book are admissible in evidence, because the tick marked against them denotes that the collector had received the money, the receipts signed by him must be evidence of the fact of such receipt of the money upon the same principle.

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LITTTLEDALE, J.:

I am of the same opinion. I at one time entertained great doubts whether entries made in a private book kept by a person for his own convenience could be evidence against a third party.

† 2 R. R. 450 (4 T. R. 514).

§ 10 R. R. 235 (10 East, 109).

‡ 2 Str. 1129.

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In *Goss v. Watlington*† the books in which the entries were made by the deceased collector were public books delivered *to him by his predecessor in office; and in *Whitnash v. George*,‡ the book in which the entry was made was one which the principal was bound to keep in the performance of the very duty for which the surety had become bound. Now, if a private book is to be considered in the same light as a public book, these entries were receivable in evidence. The receipts (which are entries made on separate pieces of paper) also were admissible, because the book is nothing more than scraps of paper put together. *Warren v. Greenville*,§ *Barry v. Bebbington*,|| and *Higham v. Ridgway*,¶ establish this general principle, that where a person has peculiar means of knowing a fact, and makes a declaration or written entry of that fact, which is against his interest at the time, it is evidence of the fact as between third persons after his death. Those cases are distinguishable from the present, because there the entries were all that was intended to be done by the party who made such entries. Here the party evidently meant to make an entry in the public book; the act, therefore, was incomplete. Looking, however, to the principle laid down in the several cases which have been referred to, I think the entries made in this private book were admissible in evidence; and if they are admissible because they are acknowledgments of the receipt of money for which the party might otherwise have a claim, it follows that the receipts themselves must be evidence upon the same principle.

PARKE, J. :

[*327] I am of the same opinion. Secondary evidence of the contents of the private book was properly received, the defendant not having produced it after *notice. The question, therefore, is, whether entries in a private book, acknowledging that he had received certain sums of money, are, after the death of the party who made them, admissible evidence against third persons, to prove the fact of the receipt of the money? The general rule undoubtedly is, that facts must be proved by testimony upon oath. This case, how-

† 3 Brod. & Bing. 132.

‡ 8 B. & C. 556.

§ 2 Str. 1129.

|| 2 R. R. 450 (4 T. R. 514).

¶ 10 R. R. 235 (10 East, 109).

ever, falls within the exception necessarily engrafted upon that rule, viz. that an admission of a fact made by a deceased person, which is against the interest of the party making it at the time, is evidence of that fact as between third persons. Upon that ground entries made by receivers, stewards, and other agents, charging themselves with the receipt of money, have been held, after their death, to be admissible in evidence, to prove the fact of the receipt of such money, and that without reference to the particular character of the person who made such entries. In *Warren v. Greenville*,† the party who made the entry was an attorney; in *Manning v. Lechmere*,‡ a bailiff; in *Higham v. Ridgway*,§ a surgeon. In *Haddow v. Parry*,|| a bill of lading signed by a master of a vessel since deceased, for goods to be delivered to a consignee or his assigns on paying freight, was held to be evidence to shew that the goods were on board. It being once established that such admissions are evidence of the facts admitted, it can make no difference that the same facts might have been proved by evidence of another kind; as, for instance, by a living witness. And we find that admissions by deceased persons have been received, where the testimony of existing persons might have been given. In *Barry v. Bebbington*,¶ *which was tried in 1791, one of the memoranda was a receipt of a sum of money in 1785. The fact of payment, therefore, was probably capable of being proved by the persons who paid the money, yet it was held, that the entry made by the deceased steward, charging himself with the receipt of the money, was evidence of the fact of such a receipt, without calling the persons who paid it. Upon the same principle, applied to this case, the entry made by the deceased collector is proof of the fact of the money having been paid without calling the persons who paid it to him. In *Goss v. Watlington*,†† and *Whitnash v. George*,‡‡ the entries were held admissible, upon the ground that they were made in a book which it was the duty of the principal to keep, and for the performance of which duty the defendant

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† 2 Str. 1129.

‡ 1 Atk. 453.

§ 10 B. R. 235 (10 East, 109).

|| 12 B. R. 666 (3 Taunt. 303).

¶ 2 B. R. 450 (4 T. R. 514).

†† 3 Brod. & Bing. 132.

‡‡ 8 B. & C. 556.

MIDDLETON ^{r.} had become bound. But I think those decisions may be supported
MELTON. on the more general principle, that an entry made by a party cognizant of a fact, and having no interest to make a false entry, whereby he charges himself with the receipt of a sum of money, is evidence of the fact of the receipt of such money. It is unnecessary to consider the question as to the receipts, because the entries in the book, if admissible, are sufficient to entitle the plaintiff to the full amount of the damages which he has recovered. But I cannot help thinking that they were admissible; and I doubt the propriety of that part of the decision in the case of *Goss v. Watlington*, by which the receipts of the deceased collector were held inadmissible.

Rule discharged.

1829.
Dec. 16.

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POWER AND ANOTHER, ASSIGNEES OF FULTON, v.
BUTCHER AND J. D. CAPET.†

(10 Barn. & Cress. 329—348; S. C. 5 Man. & Ry. 327; 8 L. J. K. B. 217.)

An insurance-broker effected, on behalf of another person, a policy under seal, with a company of which he was a member. The policy recited that the broker, upon his representation that he was duly authorised as owner, agent, or otherwise, to make assurance upon the vessel mentioned in the policy, and was desirous of making such insurance, had covenanted with the company to pay the premium, and then alleged that, in consideration of the premises and of such covenant, the policy was effected. The broker having become bankrupt, without having paid the premium to the company; it was held, that his assignees were entitled to recover from the assured the amount of the premium which he had covenanted to pay.

[*330] ASSUMPSIT. The first count of the declaration stated, that the defendants were indebted to T. Fulton, before he became a bankrupt, for work and labour by *him bestowed in and about the writing, drawing, and making out of divers policies of insurance of divers ships, &c., before that time written, drawn, and made out by the said T. Fulton, as an insurance broker; and in about the causing and procuring divers persons to insure divers sums of money upon the said ships, &c., at the special instance and request of the defendants; and for divers sums of money before

† Followed by BLACKBURN, J. and by the House of Lords in *Xenos v. Wickham* (Ex. Ch. 1863, H. L. 1867) 14 C. B. (N. S.) 435, L. R. 2 H. L. 296, 33 L. J. C. P. 13, 36 L. J. C. P.

313: also by the Court of Appeal in *Universo Marine Ins. Co. of Milan v. Merchants Mar. Ins. Co.*, '97, 2 Q. B. 93, 66 L. J. Q. B. 564, 76 L. T. 748. —R. C.

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that time advanced and paid by T. Fulton for the defendants, at their like special instance and request, to divers persons, as and for certain premiums and rewards for the underwriting and subscribing the said policies of insurance before that time underwritten and subscribed for the insurance of the said ships, and during certain voyages undertaken by the said ships, &c.; and for the trouble, care, and diligence of the said T. Fulton in that behalf, at their like special instance and request; and for divers premiums of insurance, and sums of money before that time and then due and payable from the defendants to T. Fulton, for and in respect of T. Fulton having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants, at their like special instance and request. There were counts for premiums paid for insurances, common counts for work and labour, money counts, and upon an account stated. Plea, general issue, by both defendants. Plea, also, by Butcher, that the plaintiffs in Easter Term, 1827, impleaded him for the same causes of action, and that in Trinity Term in that year he pleaded the general issue to that action. That on Monday next, after fifteen days of the Holy Trinity in the year aforesaid, he obtained a rule to pay 5*l.* 15*s.* into Court, and that he paid that sum into Court. That the plaintiffs' costs were *taxed under the said rule at 8*l.* 5*s.* 6*d.*, and that the plaintiffs agreed with him (Butcher) to take the sum of 5*l.* 15*s.* out of Court under the rule; that he paid the costs, viz. 8*l.* 5*s.* 6*d.* to the plaintiffs, and the plaintiffs accepted and received the said sum of 5*l.* 15*s.* together with the said costs, in satisfaction and discharge of the promises mentioned in the declaration in that action. The plea then alleged the two causes of action to be the same, and that the money sought to be recovered in this action might, if recoverable at all, have been recovered in the action brought against him (Butcher) alone. Replication, that the plaintiffs did not agree with Butcher to take and receive the sum of 5*l.* 15*s.* out of Court under the rule, and did not accept and receive the sum of 5*l.* 15*s.* with the said costs, in satisfaction and discharge of the promises and undertakings mentioned in the declaration in this action. At the trial before Lord Tenterden, Ch. J., at the London sittings after Michaelmas

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Term, 1828, the jury found a verdict for the plaintiffs, with 621*l.* 10*s.* damages, subject to the opinion of this Court on the following case :

The defendants were ship-owners ; Fulton, the bankrupt, carried on business as an insurance broker at Lloyd's Coffee-house, and was employed by the defendants to effect the policies, and the bankrupt accordingly effected the same at the premiums mentioned in the following account :

Oct. 22, 1825,	Insurance	£3,000, <i>Huntcliffe</i> ,	at £12 0	£360 0
Ditto,	Ditto,	600, Ditto,	2 5	13 10
Nov. 2, 1825,	Ditto,	2,000, <i>Julius Caesar</i> ,	12 0	240 0
Ditto,	Ditto,	100, <i>Fame</i> ,	1 5	1 5
Nov. 14, 1825,	Ditto,	300, <i>St. Lawrence</i> ,	1 10	4 10
Ditto,	Ditto,	500, <i>Fame</i> ,		7 10

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A copy of this account formed the particulars of the plaintiffs' demand in the action against Butcher alone, which is hereafter mentioned, and a copy of the same account, except the two items of 1*l.* 5*s.* and 4*l.* 10*s.*, formed the particulars of demand in the present action. These policies were severally effected by the said bankrupt with the "Indemnity Mutual Marine Insurance Company," and, by each of the policies, which were all under the seal of that Company, it was recited that the bankrupt, upon his representation that he was interested in or duly authorised as owner, agent or otherwise, to make assurance upon the vessel mentioned in each policy, and desirous of making such assurance, had covenanted with the company to pay the premium in respect of each of the said several and respective policies to the company ; and it was alleged, that in consideration of the premises, and of such covenant, each of the policies was effected. The names of the defendants were not mentioned in any of the policies, each of which purported to be made with the bankrupt. The bankrupt paid to the company sums of 1*l.* 5*s.* and 4*l.* 10*s.* in respect of the policy of 100*l.* on the *Fame*, and that of 300*l.* on the *Saint Lawrence*, but did not pay any of the other premiums. The bankrupt was at the time of effecting the policies a member of the company. The defendants neither were nor had been members of the company ; and by the rules of the company none but members were allowed to effect insurances. The

commission due to the bankrupt in respect of the policies amounted to 31*l.* 1*s.*, which sum the bankrupt would have been entitled and allowed by the company to deduct and retain from the amount of the premiums to be paid by him to *the company.

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[The remainder of the case is taken up with special circumstances arising out of the proceedings in a former action, on which the defendants raised a plea of *accord and satisfaction*.]

The question for the opinion of this Court was, whether the plaintiffs were entitled to recover the whole or any part of the sum of 62*l.* 10*s.*? If they were, the verdict was to stand for such sum as the Court should think right; if they were not, a nonsuit was to be entered. And it was agreed *that the Court should be at liberty to draw any conclusion from the facts stated in this case, which, in their opinion, the jury ought to have drawn.

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[After argument:]

BAYLEY, J. :

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It seems to me that the plaintiffs are entitled to the judgment of the Court for the whole sum. This is an action by the assignees of an insurance broker for work and labour, and premiums against the defendants who are ship-owners, and had employed the broker to effect certain policies on their behalf, which he did effect with a company of which he was a member. Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not, in the first instance, pay the premium to the broker, nor does the latter pay it to the underwriter. *But as between the assured and the underwriter the premiums are considered as paid. The underwriter, to whom, in most instances, the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middleman between the assured and the underwriter. But he is not solely agent; he is a principal to receive the money from the assured, and to pay it to the underwriters. In this case the policies were not in the ordinary form but by deed, and the broker covenanted to pay the premiums to the underwriters; and in consideration of that covenant the policies were effected. The

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underwriters, therefore, took a covenant from the broker to pay the premium, instead of acknowledging the receipt of the premium as they do in the ordinary case of a policy by simple contract. In such a case the action would be maintainable at the suit of the broker, on the principle that he was entitled to call upon the assured for the payment of those premiums which he had become liable to pay to the underwriters, and which they had acknowledged the receipt of. The assured have had the benefit of the policies ; and if the underwriters were liable upon the risk, they were warranted in calling upon the broker to pay the premiums. In point of justice, the assured ought to pay the broker, or in the event which has happened, of his failure, his assignees. In an ordinary case the assurers would have no claim upon the assured for the premium, because by the policy they acknowledge the receipt of it. Here there is no such acknowledgment, and therefore it may be said the assurers may claim the premiums from the assured. A contract cannot be raised by implication of law except in the absence of an express contract.

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Now *here there was an express contract between the underwriters and the assured through the agent, and by that contract the underwriter agreed to look to the broker alone for the premiums. The assured have had the same benefit from the policies as if the premiums had been advanced to the underwriters at the moment when the policies were effected. Then it is necessary to consider in what situation the broker stands, in order to ascertain whether he is not entitled to call upon the assured for the premiums. The underwriters have a claim upon him for the full amount of premiums ; and if that be so, he ought to recover those premiums from those persons who have had the benefit of the policies. But a difficulty arises in this case from the peculiar form of the declaration, and the particulars of the plaintiffs' demand. It seems to me that the premiums cannot be recovered as money paid to the defendants' use, because the bankrupt has not actually paid any money ; but when we look at the form of the declaration, and leave out parts which may be fairly omitted, I think the plaintiffs may recover the full amount of their present demand ; and I am of opinion that they are entitled to recover 31*l.* 1*s.*, which may be considered as a

compensation for the work and labour of the broker in effecting the insurance.

It has been insisted that by the form of the particulars the plaintiffs are prevented from recovering for work and labour; but I think that is not so. The plaintiffs, by their particulars, claim to recover for insurance. Now that term includes in it the compensation he is entitled to for his trouble in effecting the policies. I entertain no doubt, therefore, that he is entitled to recover upon the count for work and labour the sum of *81*l.* 1*s.* [*342] The only other question is, upon what count the plaintiffs are entitled to recover the residue of their demand for the premiums which the bankrupt became liable to pay by the covenant. I think they are entitled to recover upon the latter part of the first count, where it is stated "that the defendants were indebted to Fulton for his care and diligence, and for divers premiums of insurance then due and payable from the defendants to him for and in respect of Fulton's having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance." I think the words, "having before then underwritten and subscribed," may be rejected. The plaintiffs were not bound to prove the entire count, it was sufficient if they proved any part of it; and looking at the words I have mentioned, I think they fairly meet the present case, because the defendants are indebted to the bankrupt for policies by him caused to be underwritten in their behalf, if we are right upon the first proposition that they are indebted to him for the premiums. It seems to me that the plaintiffs are entitled to recover the full amount of their demand, not as for money paid, but part for work and labour, and the residue on that part of the first count, which charges that they were indebted to him in respect of his having caused and procured to be underwritten divers policies of insurance.

[He then dealt with the plea of accord and satisfaction, which he held was not established.] Upon the whole, therefore, I think that the plaintiffs are entitled to recover 621*l.* [343]

LITTLEDALE, J. :

The first question in this case is, whether the plaintiffs are

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entitled to recover any thing? They are clearly entitled to 31*l.* 1*s.* for compensation for insurance. The word “insurance” in the particulars of demand covers every possible claim which a broker *may have in respect of effecting the policies. It means every thing connected with insurance. There is no objection to the plaintiffs recovering on the ground of any defect in the particulars, and if that be so, I think they are entitled to recover 31*l.* 1*s.*, that being the amount of the commission the underwriters would have allowed the broker to retain and deduct out of the premiums paid by him to them for underwriting the policies, and which commission, it may be supposed, the defendants had authorised him to take.

Then the next question is, whether the plaintiffs were entitled to recover the residue of the demand? Even where the policy is in the common form, it may be difficult to say upon what principle the broker can recover the premiums as for money paid before he has actually paid them to the assurers. But it has been so decided. Here, however, the policies are in a special form. The broker has covenanted to pay the amount of the premiums to the underwriters. If he had actually paid those premiums, the assured would be bound to repay them to him. Here they have not been paid. But by the usage the assured may be considered as having entered into an agreement to consider the premiums as having been paid by the broker to the underwriters, and therefore, it seems to me, that the plaintiffs would have been entitled to recover if there had been any special count adapted to the circumstances of this case, stating a request to the broker to enter into a covenant to pay the premiums, that he entered into such covenant, and that the defendants thereby became liable. The difficulty I have in this case arises from the peculiar form of the count. It states that the defendants were indebted to Fulton before *he became bankrupt for the work and labour of the said T. Fulton by him performed, in the writing, drawing, and making out of divers policies of insurance. Now it is clear that he is not entitled to recover for the premiums payable to the underwriters under that part of the count. The count then goes on, “and for divers sums of money before that time advanced and paid by Fulton for the defendants to divers

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persons, as and for premiums for underwriting and subscribing the said policies." Now here the premiums were not paid, and therefore the plaintiffs cannot recover upon those words of the count. Then comes the part of the count upon which it is said they are entitled to recover, "and for divers premiums of insurance and sums of money before that time and then due and payable from the defendants to Fulton for and in respect of Fulton's having before then underwritten and subscribed, and caused and procured to be underwritten and subscribed, divers policies of insurance for the defendants at their like special instance and request." Now Fulton did not underwrite any policies for the defendants. The words "divers premiums" seem to me to apply to the word "underwritten," because the premiums are a debt due from the assured. But it is said, that there is a debt due to Fulton in respect of his having caused policies to be underwritten; but that is not a direct debt due to Fulton, but it is a claim arising in respect of Fulton's having pledged his responsibility by covenant. It rather seems to me, therefore, that there should have been a special count framed for the purpose of meeting this particular case. The effect of this objection, if it ought to prevail, would only be to subject the defendants to another action, for I entertain no doubt whatever upon the first point.

[On the special plea, he held the satisfaction incomplete.]

PARKE, J.:

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I think the plaintiffs are entitled to recover the full amount of their claim, but not on the count for money paid, for that count cannot be maintained without proving actual payment, or that which is equivalent to payment: *Maxwell v. Jameson*,† *Taylor v. Higgins*.‡ The giving of a security to pay is not equivalent to *actual payment. In ordinary cases of insurance, such a form of action (if it can be supported) must be supported on the ground that the insurance is for a present premium paid down by the broker to the underwriter. By the course of dealing, the broker has an account with the underwriter; in that account the broker gives the underwriter credit for the premium when the policy is effected, and he, as the agent of both the assured and the

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† 2 B. & Ald. 51.

‡ 3 East, 169.

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underwriter, is considered as having paid the premium to the underwriter, and the latter as having lent it to the broker again, and so becoming his creditor. The broker is then considered as having paid the premium for the assured. The fact of giving credit in account by the broker to the underwriter, and the underwriter by the terms of the policy having acknowledged the receipt of the premium, are equivalent to actual payment. Here the policy was not effected for a present premium, and there was no credit in account given by the broker to the underwriter for the premium. The insurance was of a peculiar nature. The underwriter effected the policy in consideration of a special covenant by the broker to pay that premium, and the broker did not give credit for it to the underwriter in an account with him. There has not been any actual payment of it, nor any thing which is equivalent to payment. The plaintiffs, therefore, cannot recover the premium as money paid to the use of the defendants. But they are entitled to recover compensation for the beneficial services rendered by the broker to the defendants; and I think they are not precluded from recovering such compensation in this action by the form of their particulars of demand. It seems to me also that they may recover the whole of their demand as "money due for premiums for policies caused and procured *to be effected by the bankrupt." He undoubtedly did procure to be underwritten for them policies in this particular form; and the defendants have had the benefit of them, and they have been as beneficial to the defendants as if the premiums had been actually paid by the bankrupt to the underwriters; for the company cannot have any recourse to the defendants for the premiums, and in consequence the defendants are liable to pay a sum of money to the plaintiffs. A special count, stating the facts out of which the legal liability of the defendants arose, would be in substance an *indebitatus* count for policies caused to be effected by the broker at the request of the defendants, expanding the terms of it, and describing the special nature of the policies effected for the defendants upon the credit of the broker. I think, therefore, the plaintiffs are entitled to recover under this particular form of declaration. * * *

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Judgment for the plaintiffs.

THE CONSERVATORS OF THE RIVER TONE, IN THE
COUNTY OF SOMERSET, *v.* ASH AND OTHERS.†

(10 Barn. & Cress. 349—393; S. C. 8 L. J. K. B. 226.)

1829.
Dec. 18.

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By an Act for making and keeping the river Tone navigable, it was enacted, that the thirty persons therein named and their successors should be conservators of the river, and should have power to cleanse, scour, open, and keep navigable the said river; and also to cut and make a new channel, if occasion should be, through the ground of other persons, making recompense to the owners.

By another clause the conservators were to contract with the owners of land for the loss or damage which any of them should sustain by making the river navigable; and if the owners and the conservators could not agree touching the value thereof, or if the title were in an infant, *feme covert*, or any other person unable to contract, then the sheriff was to summon a jury to ascertain the value, and the determination of the jury was to bind all parties; and in case the parties interested in the land should not appear, then the jury, in their absence, were to proceed to determine what satisfaction should be made to them respectively, which determination was to be good, valid, and conclusive, and to vest an estate in fee-simple in the conservators and their successors, or other right, title, or interest in the lands.

By another clause it was enacted, that there should always be conservators of the said river, and that the thirty persons therein named should continue conservators during their lives, unless any of them should be removed for misbehaviour, which the major part of the conservators were thereby empowered to do, and when the number of the conservators at any time by death or removal should be reduced to twenty, then the survivors were to choose other persons to be joined to themselves to be conservators of the river, so as to make up the number thirty; and the conservators were enabled by the name of the conservators of the river Tone, in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid; and it was made lawful for any persons to convey any estate to the conservators and their successors without licence to alien in mortmain. And the conservators, or the major part of them, or any five of them appointed by the major part of them to be a committee, were authorized in writing under their hands and seals to make any contract, which contract should bind the whole body of the conservators, and the conservators might sue and be sued by the said name of the conservators of the river Tone, in the county of Somerset.

By a subsequent Act the conservators were authorized to make orders in writing for the government of the boatmen, bargemen, or others, in navigating boats or barges, or floating timber on the said river:

Held, that as it manifestly appeared from the different clauses of these

† Compare *Mayor, &c. of Salford v. Lancashire County Council* (C. A. 1890) 25 Q. B. D. 384, per LINDLEY, L. J., p. 389; 59 L. J. Q. B. 576, 579.—B. C.

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Acts of Parliament that the conservators should take land by succession and not by inheritance, although they were not created a corporation by express words, they were so by implication; and that being so, they were entitled to sue in their corporate name for an injury done to their real property.

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TRESPASS for entering the plaintiffs' wharfs, pens, pounds, bridges, locks, wears, and closes covered with water, in the parish of North Cunny, and fixing and *fastening to and upon the gates and posts of the plaintiffs there divers locks, staples, hinges, and bolts, and thereby damaging the same, and thereby and therewith shutting, locking, and fastening the said gates, and keeping them so shut for long spaces of time, and at other times unlocking and opening them, and ejecting the plaintiffs from their said premises, and keeping them so ejected for a long space of time, and during that time receiving tolls and duties belonging to them amounting to 3,000*l.*, and during all that time preventing the plaintiffs from using them as they would otherwise have done. Plea, first, not guilty. Secondly, that at the time of exhibiting the said bill, there was not any such body politic or body corporate as the conservators of the river Tone as by the said declaration was supposed. Thirdly, that at the time of exhibiting the said bill, the said persons so suing as the conservators of the river Tone were not a body politic or corporate as by the said declaration was above supposed. Fourthly, that the persons so suing as the conservators at the time of exhibiting the said bill against the defendants were not enabled or empowered to sue, or capable of suing, as the conservators of the river Tone, upon the supposed causes of action in the said bill and declaration above mentioned, or any of them, or any part thereof. Fifthly, that the messuages, wharfs, pens, pounds, bridges, and closes, were the messuages, wharfs, pens, pounds, bridges, and closes, soil and freehold of the Company of Proprietors of the Bridgwater and Taunton Canal Navigation, and justifying as their servants. Sixthly, as to the taking and receiving the said tolls and duties in the declaration mentioned, that *the said tolls and duties at the said several times, when, &c. were certain tolls and duties for the tonnage of certain goods, wares, merchandize, and commodities which had been theretofore carried and conveyed from such part of the said canal and cut

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mentioned in the Act of the 51 Geo. III., as was not at the time of passing that Act intended to extend, and never did extend, from the parish of Clevedon, in the county of Somerset, to the west side of the river Parrett in the same county, and which tolls and duties were vested in the Company of Proprietors of the Bridgwater and Taunton Canal Navigation under and by virtue of the said last-mentioned Act, and of a certain other Act made and passed in the 5th year of Geo. IV., and so justifying as servants of the company. Seventhly, as to the taking and receiving of the said tolls and duties, that before and at the said several times, when, &c. the said Company of Proprietors of the Bridgwater and Taunton Canal Navigation were seised in fee of and in the said tolls and duties, and justifying as their servants. Eighthly, as to the taking and receiving the said tolls and duties that before and at the said several times, when, &c. the said company were lawfully possessed of and entitled to the said tolls and duties, and justifying as their servants. Upon all these pleas issue was taken and joined. At the trial before Gaselee, J. at the Spring Assizes, 1828, for the county of Somerset, a verdict was found for the plaintiffs for the damages in the declaration, subject to the opinion of this Court upon the following case:

By an Act of Parliament passed in the tenth and eleventh years of William III. for making and keeping the river Tone navigable from Bridgwater to Taunton in the county of Somerset, reciting, that John Mallett, Esq., in pursuance of a commission under the great seal of England granted in the thirteenth year of Charles I., had at *his very great expense made the said river in some sort navigable from the said town of Bridgwater to certain mills called Ham Mills in the said county; in consideration whereof his late Majesty King Charles II. by his letters patent under the great seal of England, in the thirty-sixth year of his reign, had granted to the heirs of the said J. Mallett the sole navigation of the said river from Bridgwater to Ham Mills aforesaid; and that all the interest of J. Mallett and his heirs in the said river and navigation on the same, and the said commission and letters patent, was, by good and sufficient conveyance in the law, conveyed and assigned to, and vested in, J. Frind, gentleman, and twenty-nine other persons therein named, inhabitants of the

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parish of Taunton St. Mary Magdalen, Taunton St. James, Bishop's Hull, or Wilton, in the county aforesaid, who, for a valuable consideration, had purchased the same; and that for the benefit of trade, preserving the highways therein in that behalf mentioned, and employing the poor, the said purchasers were willing to undertake, at their own expense, until they could be repaid as thereafter was directed and appointed, not only to maintain and keep the said river navigable, and make it more beneficially and effectually so, from the said town of Bridgwater to Ham Mills, and to maintain and keep up all bridges and works made or built by the said J. Mallett to that end, but also to erect and build such other bridges and works as should be necessary, and also to clear and effect a passage for barges, boats, and other vessels from Ham Mills to the said town of Taunton; it was enacted, that the said thirty persons and their successors, as thereafter mentioned, should be and they were thereby declared and appointed conservators of the said river, and that they, or the major part of them, should *have power, and they were thereby empowered and authorised by themselves, their servants, or agents, to cleanse, scour, open, make, and keep navigable the said river Tone from the said town of Bridgwater to Ham Mills aforesaid, and from thence to the said town of Taunton; and for that purpose to dig the banks of the said river or other ground, ditch, brook, or stream near thereunto adjoining, &c.; and also to cut and make a new channel, if occasion should be, through the ground of his Majesty or any of his subjects, making recompense for the same to the owner or owners of such ground, according to their respective interests and estates therein, pursuant to the directions of that Act; and likewise to cut, scour, or open any other stream or watercourse that should be convenient for making the said passage or river navigable; and also to open, prepare, make, and erect any bridges, wharfs, locks, weirs, turnpikes, pens of water, or other works in or near to the said river or passage that should be fit and necessary for the same; and also to make or lay out a path or way on either or both sides of the said river for watermen, boat or bargemen, and others navigating vessels on the said river. The Act then provided for the mode of settling the compensation to be paid by

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the conservators for any lands, &c. taken or injured by them in carrying into effect the objects of the statute, and provided that the determination so made should be valid, and should vest an estate in fee-simple in the said conservators and their successors, or other right, title, and interest in any lands or hereditaments, according to the tenor of such order. And for reimbursing the said conservators the principal money of the said purchase, and what should be laid out in the making or keeping *the said river navigable, &c., together with interest for the same after the rate of six per cent. per annum, until the conservators should be repaid the said principal and interest of what they had disbursed or should thereafter disburse for the purposes aforesaid, certain tolls therein mentioned were imposed upon every boat, barge, or vessel; and remedies were provided for the recovery of the tolls. The Act then proceeded to enact that when the conservators should have been fully reimbursed the principal and interest after the rate aforesaid of all monies advanced, and which should be expended by them respectively in purchasing the interest of the heirs of the said J. Mallett, and in making and keeping the said river navigable, &c. certain lesser tolls therein mentioned should be imposed; and that the said tolls, together with the product of all gifts and grants to the conservators of the said river, should be from time to time applied to the repairing such bridges, wears, &c. as were or should be built or made by the said conservators for maintaining and keeping the said river navigable, and be annually accounted for as therein directed; and the surplus of what should arise by the means aforesaid should be by the said conservators employed and disposed of for the only use, benefit, and advantage of the poor of the said town of Taunton and parishes of Taunton St. Mary Magdalen and Taunton St. James in the county aforesaid, who were empowered and authorised to lay out and dispose of the same in building one or more hospital or hospitals, or otherwise, from time to time according to their best discretions, for the better educating and maintaining such poor children as were or should become chargeable to the town and parishes aforesaid; and such hospital or hospitals when built *should be governed and regulated by such persons, rules, and orders as should be appointed, given,

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and made from time to time by the said conservators for the time being, so as such rules and orders were first approved by the judges of assize and nisi prius for the county of Somerset, or one of them. The Act then directed the mode in which the accounts were to be kept. And it further enacted, that for the better preserving and keeping the said river navigable, when made so, and for making the same navigable, there should always be conservators of the said river; and that the said thirty persons should be and were thereby constituted conservators of the said river Tone, to continue during their lives, unless any of them should be removed for misbehaviour, which the major part of the said conservators were thereby empowered to do; and when the number of the said conservators at any time by death or removal should be reduced to twenty, then the surviving conservators should from time to time assemble, and by the major part of them so assembled choose other persons to be joined to themselves to be conservators of the river Tone, so as to make up the number of the said conservators thirty; and the said conservators were thereby enabled, by the name of conservators of the river Tone, in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or land in fee, or for any other estate or term for the uses aforesaid; and it should be lawful for any person or persons to convey any estate or estates to the said conservators and their successors without licence to alien in mortmain; and the said conservators, or the major part of them, or any five of them, being appointed by the major number of them, to be a committee for *transacting any thing relating to the ends aforesaid, should or might, in writing under their hands and seals, make any contract or agreement, lease or bargain, with any person or persons, body politic or corporate, touching the premises; which contracts, agreements, and leases should be good and valid in law, and bind as well the whole body of the said conservators, and the payments thereby enacted to be made for passage or navigation on the said river, and all the estate, real and personal, which the said conservators should be seised or possessed of, to the uses aforesaid, as themselves and all other persons making and signing the same; and the said conservators should or

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might sue or be sued on such contracts, by the said name of
 “The Conservators of the river Tone, in the county of Somerset.”

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By an Act passed in the sixth year of Queen Anne, for the more effectual making and keeping the river Tone navigable from Bridgwater to Taunton, in the county of Somerset, reciting the Act of Will. III.; that the navigation was partly made, and that by an account allowed by the justices at the General Quarter Sessions for the county of Somerset in 1707, the balance then due to the conservators was 3,966*l.*, the conservators, after building a lock at or near a place called Round Island, were allowed certain additional tolls therein mentioned, and powers were given them to erect the lock and to collect the additional tolls.

By an Act of the 44 Geo. III., reciting the two Acts already mentioned, it was enacted, that it should be lawful for the conservators of the said river for the time being, or the major part of them, to make any orders or regulations in writing for the government of the boatmen, *bargemen, or others, in navigating boats or barges, or floating timber on the said river; which orders or regulations being laid for examination and correction before the justices of the peace assembled at any General Quarter Sessions for the said county next after Midsummer, and published twice in some newspaper commonly circulated in the said county between that time and the next General Quarter Sessions to be held after the following Michaelmas, and then approved and confirmed at such last-mentioned Sessions, should be duly observed and kept by all persons using the said river for navigating boats, barges, and other vessels or floating timber; and that every person who should offend against any of such orders or regulations, being thereof convicted before any one of his Majesty's justices of the peace for the said county, should for every such offence forfeit a sum not exceeding 5*l.* nor less than 40*s.*

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By an Act of the 51 Geo. III. which authorized the making of a canal from the river Avon at or near Morgan's Pill, in the parish of Easton in Gordano, otherwise St. George's in the county of Somerset, to or near the river Tone, in the parish of Saint James in Taunton, in the said county, and a certain

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navigable cut therein described; it was enacted, that certain persons therein named, and their respective successors, executors, administrators, and assigns, or such of them as should from time to time be possessed of any share in the navigation thereby authorized to be made, should be and were thereby united into a company for carrying on, making, completing, and maintaining of the said canal, cut, rail, or carriage way or stone road, for the passage of boats, barges, and other vessels, carts and carriages, according to the rules and directions thereafter contained, and *should for that purpose be one body politic and corporate, by the name of the Company of Proprietors of the Bristol and Taunton Canal Navigation. And reciting that differences might arise between the said company of proprietors and the owners of or persons interested in the lands, grounds, tenements, waters, rivers, or hereditaments which should or might be taken, used affected, damaged, or prejudiced in pursuance of the powers thereby granted, touching the purchase money or recompense to be paid or made for the same, it was thereby further enacted, that every person seised or entitled in his own right or in right of his wife (but not as mortgagee) at the time of his acting, of or to any freehold or copyhold estate or both in the county of Somerset of the clear yearly value of 100*l.*; and also every person residing in the said county and within twenty miles of the said intended canal and cut respectively, having a personal estate or a real and personal estate together of the value of 300*l.* should be and was thereby appointed a commissioner for settling and determining all matters and differences which should arise between the company and the several persons or proprietors interested in any lands, grounds, tenements, waters, or other hereditaments that should be taken, used, or prejudiced in pursuance or execution of any of the powers thereby granted. And it was thereby further enacted, that if the said company of proprietors, or other persons so interested or entitled as therein aforesaid, should refuse to submit such compensation as therein aforesaid to the determination of the commissioners therein mentioned, or should be dissatisfied with their determination respecting the same, or should refuse to receive upon due tender thereof such purchase money, annual rent, or recompense

as *should be so adjusted and determined to be paid as therein aforesaid, or should neglect or refuse to treat, after the notice therein specified, or should not agree with the said company concerning the same, or should by reason of absence be prevented from treating, or should by reason of nonage or other impediment be incapable of treating or making such agreements as should be expedient for enabling the company to proceed in the making and carrying on of the said canal and other the works aforesaid, then and in any or either of the said several cases, the said commissioners, assembled at a meeting to be held in a manner thereinbefore mentioned, were thereby empowered and required from time to time to issue a warrant or warrants under their hands and seals to the sheriff of the said county of Somerset, commanding such sheriff to impanel, summon, and return a jury to appear before the justices of the said county of Somerset at some court of General Quarter Sessions of the peace to be holden for the said county, and the said justices were thereby empowered also to summon before them all persons necessary to be examined as witnesses; and such jury, upon their oaths, should enquire and assess and ascertain the sum or sums of money or annual rent to be paid for the purchase of such lands, grounds, tenements, or hereditaments as aforesaid, and also what other and distinct sum or sums of money should be paid by way of recompense for the damages which should or might be so sustained as aforesaid; and the justices should give judgment for such purchase-money or recompense as should be assessed by such jury; which said verdict and the judgment to be thereupon pronounced, should be binding and conclusive to all intents and purposes against all bodies politic, corporate, or *collegiate, and all other persons whomsoever. And reciting that by the 10 & 11 Will. III. certain persons therein named and their successors were thereby appointed conservators of the said river, and certain powers were thereby given and granted to them for making and keeping the same river navigable, and other purposes therein mentioned; and that it was thereby enacted, that the surplus of what should be received or arise from the tolls thereby directed to be levied, after making and keeping the same river navigable, and reimbursing the said

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conservators the principal money they had or should lay out with interest as therein mentioned, should be by the said conservators employed and disposed of for the only use, benefit, and advantage of the poor of the said town of Taunton, and the parishes of Taunton St. Mary Magdalen and Taunton St. James in the said county of Somerset, who were thereby empowered to lay out and dispose of the same (as in that Act mentioned), and reciting the Acts of the 6 Anne and the 44 Geo. III.; and that the making of the said intended canal and other works authorized to be made by virtue of the Act so passed in the 51 Geo. III. would be very prejudicial to the tolls authorized to be levied and collected by the said therein-recited Acts from the Tone navigation; the said company of proprietors were by the said Act of the 51 Geo. III. authorized and required, within three calendar months next after the passing of that Act, to contract and agree with the conservators of the said river Tone navigation, and other persons proprietors of shares or parts of shares, or interested therein, for the absolute purchase of their several and respective estates, rights, and interests in and to the same; and also to contract and agree with the overseers of the poor for the time being of the said *town of Taunton, and the said several parishes of Taunton St. Mary Magdalen and Taunton St. James aforesaid, for the absolute purchase of the respective estates, rights, and interests of the said town and parishes, under and by virtue of the said therein-recited Acts, or any of them; and that in case any dispute should arise touching the monies to be paid for any such purchase, or any matter or thing in anywise relating thereto, then the same should be submitted to a jury, to be determined in such and the like manner as the purchase monies of any lands or grounds directed to be purchased or taken by virtue of that Act should be determined, in case any dispute should arise about the same. And it was thereby further enacted, that the said navigation when so purchased should from time to time, and at all times thereafter, be maintained and supported by the said company of proprietors by and out of the tolls from time to time received by them on the line of such navigation, and that the surplus of such tolls should after such application be from time to time applied and disposed of as

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directed by the said therein-recited Acts, save and except the rights and interests of such person and persons as were directed to be purchased, and intended to be barred by virtue of that Act. And it was thereby further enacted, that the said company of proprietors should, after such purchase should be so made as aforesaid, have, use, and enjoy such and the like powers of maintaining and supporting the said navigation, and should be subject to such and the same rules, regulations, penalties, and forfeitures as the said conservators and other persons proprietors of shares or parts of shares, or otherwise interested therein, had and enjoyed, and were *subject and liable to under and by virtue of the said recited Acts, or any of them.

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By an Act of the 5 Geo. IV. to abridge, vary, extend, and improve the Bristol and Taunton Canal Navigation, and to alter the powers of the Act of the 51 Geo. III., it was enacted, that all and every the powers and authorities in and by that Act given and granted for making so much of the said canal as was intended to be made and extend from the said river Avon, at or near Morgan's Pill aforesaid, unto the western boundary of the said parish of Clevedon, should be and the same were thereby repealed. And it was thereby further enacted, that the said Company of Proprietors of the Bristol and Taunton Canal Navigation should no longer be called by the name of the Company of the Proprietors of the Bristol and Taunton Canal Navigation, but that the same company should, from and after the passing of that Act, be called and known, and continue to be incorporated, and have continuance by the name of the Company of Proprietors of the Bridgwater and Taunton Canal Navigation. And it was thereby further enacted, that so much of the said Act of the 51 Geo. III. as related to the appointment of commissioners for settling, determining, and adjusting such questions, matters, and differences as were therein mentioned, and all the powers by the said last-mentioned Act vested in or given to the said commissioners, should be and the same were thereby repealed. And it was further enacted, that in case of any difference of opinion between the said company of proprietors and any body or bodies politic, corporate, collegiate, or ecclesiastical, corporation aggregate or sole, tenant or tenants

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for life, for years, or in fee-tail general or special, feoffees in trust *for charitable or other purposes, husbands, guardians, committees, trustees, or any other owners, proprietors, or occupiers, or other person or persons whomsoever, either seised, possessed of, or interested in or to any lands, tenements, or hereditaments, or any part and parts thereof which might be required by the said company of proprietors to be taken or used for the purposes of the said recited Act of the 51 Geo. III. and that Act relative to the price or value to be given for the same, or relative to any damages or compensation which might be claimed by any such person or persons for the same; and in case such price, value, damages, or compensation could not be settled, adjusted, and agreed for by and between the said company and such proprietors and other persons interested in the said lands, tenements, or hereditaments; or if any such bodies politic, corporate, collegiate, or ecclesiastical, corporation aggregate or sole, trustee or trustees, or other person or persons interested or entitled as aforesaid, should refuse to receive, upon due tender thereof made, such purchase-money or such compensation as should be offered to be paid by or on behalf of the said company, it should be lawful for the committee of management or sub-committee, and they were thereby empowered and required from time to time to issue a warrant or warrants under the hands and seals of any three or more of them to the sheriff of the said county of Somerset, thereby requiring such sheriff to impanel, summon, and return a jury to come before such sheriff; which persons so to be summoned, impannelled, and returned as aforesaid, were thereby required to go and appear before the sheriff of the said county of Somerset at such place and time as in such warrant should be named or required; and

[*364] such *jury upon their oaths should enquire of, assess, and ascertain the sum or sums to be paid for the purchase of such lands, tenements, or hereditaments, or should enquire of, assess, and ascertain whether any and what sum, recompense, or sums of money ought to be paid for any such damage or other matter as should be claimed to have been incurred or sustained by any such party as aforesaid.

The town of Taunton consists of the several parishes of

Taunton St. Mary Magdalen and Taunton St. James. There are no officers of the poor of the town of Taunton, except those appointed for those two parishes. In October, 1827, the said company tendered to the then churchwardens and overseers of the poor of the parishes of Taunton respectively the sum of 470*l.* for each of those two parishes, for the absolute purchase of the respective estates, rights, and interests of the same two parishes respectively, under and by virtue of the said three Acts of 10 & 11 Will. III., 6 Anne, and 44 Geo. III., or any of them, which several sums of 470*l.* and 470*l.* the said churchwardens and overseers respectively refused to receive or accept, whereupon the said sub-committee of management of the said company did, on the 17th day of October, 1827, issue a warrant under the hands and seals of four of them, to the sheriff of the county of Somerset, thereby requiring such sheriff to impanel, summon, and return a jury to come before him the said sheriff on the said 26th day of October, 1827, to enquire of, assess, and ascertain the sum of money to be paid by the said Bridgwater and Taunton Canal Company to the conservators of the said river Tone navigation, and other persons proprietors of shares or otherwise interested therein, for the absolute purchase of their several *and respective estates, rights, and interests in and to the same, and also to enquire of, assess, and ascertain the sum of money to be paid by the said Company of Proprietors of the Bridgwater and Taunton Canal Navigation to the said overseers of the poor for the time being for the said parish of Taunton St. James, for the absolute purchase of the estate and interest of the said parish, and of the poor thereof, in the said river Tone navigation, by virtue of the statutes in that behalf made; and also to enquire of, assess, and ascertain the sum of money to be paid by the said company of proprietors to the overseers of the poor of the said parish of Taunton St. Mary Magdalen, for the absolute purchase, estate, and interest of the said last-mentioned parish, and of the poor thereof, in the said river Tone navigation, by virtue of the same statutes. On the same 17th day of October, 1827, a notice was served by the said company on the conservators, and also on the churchwardens and overseers of the several parishes of Taunton St. James and Taunton St.

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Mary Magdalen, that the high sheriff of the county of Somerset would impanel, summon, and return a jury to the intent expressed in the said warrant, and repeated in the said notice. In pursuance of the said requisition the sheriff of the county of Somerset, summoned, impannelled, and returned a jury as directed by the said last-mentioned Act. On the 26th of October, 1827, the said sheriff caused the said jury to come and assemble, and they did come and assemble, in pursuance of the said warrant, at the time and place, and to and for the intent and purpose in the said warrant mentioned. And thereupon afterwards, on the 29th of October, 1827, a certain inquisition, verdict, and judgment of and concerning the premises, and the proceedings *thereon upon that occasion, under the hands and seals of the said sheriff and of the said jury, were returned by the said sheriff to the clerk of the peace of the said county of Somerset, to be entered and kept among the records of the Quarter Sessions of the same county, where the same were entered and kept.

The jury assessed the damage of the overseers of the parishes at 200*l.* for each parish.

On the 1st day of November, 1827, all the costs and charges incurred in summoning, impannelling, and returning such jury, taking such inquisition, and the attendance of witnesses, and recording the verdict and judgment thereon, after notice of an appointment to that purpose, to the churchwardens and overseers of the said several parishes of Taunton St. James and Taunton St. Mary Magdalen were examined into, settled, and ascertained by T. Hassell, Esq. then a justice of peace for the said county of Somerset, not interested in the matter so in question, at the sum of 348*l.* 15*s.* 6*d.*, one moiety whereof he directed to be paid and borne by the churchwardens and overseers of the parish of Taunton St. James and Taunton St. Mary Magdalen, both in the county of Somerset.

On the 2nd of November, 1827, the said company tendered and offered to pay the sum of 212*l.* 16*s.* 1½*d.* to the churchwardens and overseers of the poor of the parish of Taunton St. Mary Magdalen, and the further sum of 212*l.* 16*s.* 1½*d.* to the churchwardens and overseers of the poor of the parish of

Taunton St. James aforesaid, which they respectively refused to receive.

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On the 6th of November, 1827, the company, with the privity of the accountant-general of the Court of Exchequer, paid into the Bank the sum of 300*l.* for the use of *the churchwardens and overseers of the poor of Taunton St. James aforesaid, and the further sum of 300*l.* for the use of the churchwardens and overseers of the poor of the parish of Taunton St. Mary Magdalen aforesaid.

The several matters and things complained of in the declaration were done on the 9th and 10th days of November, 1827, at which times, and for more than twenty years next before those times, the said conservators were in possession of the several premises, matters, and things therein mentioned, and of the said river Tone navigation, and in receipt of the several tolls payable in respect thereof.

The said company of proprietors had for more than five years before the doing of the said several matters and things so complained of purchased all the shares and parts of shares of and in the monies expended in making the said river Tone navigable, then or still remaining due and payable, and were and are the sole proprietors of all such shares and parts of shares.

The said conservators have yearly accounted to the justices as required by the said Acts up to and inclusive of Midsummer, 1827; and it appears by their accounts delivered to the said justices for the years 1825, 1826, and 1827, that the said company were at those times such sole proprietors of all such shares and parts of shares.

The defendants at different times, some between 1811 and 1822, and some in the latter year, contracted and agreed with the several and respective persons, proprietors of shares or parts of shares of the debt then due from, and for, and in respect of the said navigation, some few of whom were conservators for the absolute purchase *of their several and respective estates, rights, and interests in and to the same shares or parts of shares.

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In the statement exhibited at the General Quarter Sessions of the peace for the county of Somerset, Michaelmas, 1823, by the conservators under the said Acts of their account of such receipts

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and payments from the 24th of June, 1822, to the 24th of June, 1823, it is alleged as follows: "The river is debtor to principal monies due and in arrear on the 24th of June, 1822, to the Bristol and Taunton Canal Company, they being the proprietors, of all the shares for monies advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators." And by the statements exhibited by the conservators of their accounts from the 24th of June, 1824, to the 24th of June, 1825, it is alleged as follows: "The Bridgwater and Taunton Canal Company are entitled to all the money due on the Tone;" and also as follows: "Principal monies due and in arrear to the 24th of June, 1824, to the Bridgwater and Taunton Canal Company, they being proprietors of all monies advanced for making and keeping the said river Tone navigable, which proprietors are assignees of the conservators."

The questions for the opinion of the Court were, whether the defendants were entitled to do or commit the said several matters and things so complained of, or any of them? and, whether the plaintiffs were entitled to sue by the name and style of "Conservators of the river Tone?"

[After argument:]

[376] BAYLEY, J. :

I entertain no doubt upon any of the questions that have been raised in this case. The first question is, whether the conservators of the river Tone are a corporation? It is clear that a corporation may be created by Act of Parliament. The question therefore is, whether it appears by the terms used in, or the powers given to the conservators of the river Tone by, the Act of Parliament that it was the intention of the Legislature that they should be a corporation? Now corporators take land by succession; individuals by inheritance, and where individuals take as joint-tenants the land vests in the survivor and the heirs of the survivor. If the conservators took land as individuals, whenever new conservators were appointed, the right to the land would remain in the conservators in whom it had been before that new appointment, unless it was conveyed *by deed

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to the new conservators. The statute of Will. III. begins by enacting that "the thirty persons therein named, and their successors as thereafter is mentioned, shall be and they are thereby declared conservators of the river Tone." They are to execute certain public purposes. First, they are to make and keep that river navigable, and next they are to reimburse the persons who have subscribed their money to effect these purposes of the Act, by paying them their principal, together with interest at the rate of 6 per cent., and then the surplus, if any, is to be for the use, benefit, and advantage of the poor of two parishes in Taunton, and that surplus is to be laid out in the building of hospitals for the better educating and maintaining poor children. The conservators do not appear necessarily to have any private purposes of their own to answer. All the purposes for which they are appointed are distinctly pointed out by the Act of Parliament; and if they have no private purpose of their own to answer, one should rather expect, *à priori*, that they would be made a body corporate, especially if the functions which they have to execute render that necessary. Now, first, the conservators are enabled, by the name of Conservators of the river Tone, in the county of Somerset, to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid. They are therefore entitled to take, not in their natural names, but by a name which, if they were incorporated, would be a proper name of incorporation, and they are to take for the uses aforesaid. All those uses, with the exception of that of repaying to the individuals who have subscribed their principal and interest, are public purposes. Then the Act empowers *any persons to convey any estate to the conservators or their successors without license to alien in mortmain. That provision "without license to alien in mortmain" would have been wholly unnecessary if they took in their individual capacity. The Act then proceeds to enact that the said conservators, or the major part of them, or any five of them, being appointed by the major number of them to be a committee for transacting any thing relating to the ends aforesaid, shall and may, in writing under their hands and seals, make any contract, &c. with any person touching the

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premises, which contracts shall bind the conservators, and they shall be liable to be sued upon them. It is said that that implies that the body at large was not intended to be a corporation generally. But the power given by that clause is one which, if it were not expressly given, a corporation would not have had. A corporation can only do corporate acts at a corporate meeting. Here the Legislature authorizes certain individuals of the company to do an act which is to be binding on the body at large, subject to a condition that those acts shall be done in writing under their hands and seals, and then enacts that the conservators may sue or be sued on such contracts by the said name of "The Conservators of the river Tone, in the county of Somerset." Now it has been contended, that as the Legislature gives a special power to the conservators to sue on those contracts by the name of the conservators, that implies a negative, and that they cannot therefore be entitled to sue in any other case by that name. It appears to me, however, that that provision was made for a special reason, and that it is perfectly consistent with the notion that they were a body corporate and entitled to sue as such in respect of ordinary corporate *acts, because the Legislature thereby gives them a right to sue, not in respect of an ordinary corporate act, but in respect of an extraordinary act, which any five members nominated by the body at large might sanction by writing under their hands and seals. That is not a corporate act; and if it be not, the corporation would not have been entitled to sue in respect of such an act, unless a special authority had been given to them for that purpose. Giving them that power in that specific manner implies that the Legislature understood that they had previously given them a right to sue in their corporate name in respect of any ordinary corporate act.

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Then as to the power given by the 44 Geo. III. to make bye-laws. A corporation, generally speaking, have a right to make bye-laws to bind their own members, but not to bind strangers. Now the 44 Geo. III. authorizes the conservators, or the major part of them, to make any orders or regulations in writing for the government of the boatmen, bargemen navigating boats, &c. or floating timber on the river. That is a bye-law to bind

strangers, which they could not have made unless the Act of Parliament had enabled them to do so. It seems to me that that furnishes a strong argument to shew, that the conservators were a corporation with a power to make bye-laws in general binding upon their own members, a special power being given to them by this clause to make bye-laws binding on others. The provision made for filling up the number of conservators also shews that they were intended to be a corporation; for what would be their state if they were not a corporation? Thirty conservators are named in the first place, and then, when the number is reduced to twenty, the surviving conservators *are to assemble, and, by the major part so assembled, to choose ten other persons to be joined to themselves to be conservators, so as to make up the number thirty. When the conservators, therefore, are reduced to the number of twenty, they may add ten. Then what is to be the consequence of adding these ten? Are they to have all the rights of conservators as soon as added, or is something more required to be done before they acquire those rights? If the property originally taken by the conservators, or afterwards given to them, vested in them as a corporation, the very moment that the new conservators are added the corporate lands will vest in them as well as in the former conservators; but if the land vested in the conservators, as individuals, and not as a corporation, there must be some conveyance from the twenty to vest the property in the ten together with them. That would not only occasion expense, but might also, unless it was specifically provided for, make the ten tenants in common with the twenty, whereas they ought to be joint-tenants. Considering, therefore, that the Act authorizes any person to convey any estate to the conservators and their successors, in the first instance, and that it is necessary and convenient that the new conservators, as soon as they are elected, should have all the corporate property vested in them, it seems to me that the conservators are a corporation; and if they are, that they have a right to sue in their corporate name. * * *

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LITTLEDALE, J.:

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I think the plaintiffs are entitled to the judgment of the

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Court. The first question is, whether the conservators of the river Tone are a corporation? Upon that it becomes material to consider in what way a corporation may be formed. Now a corporation may exist, first, by common law, as a King, Bishop, or parson; secondly, by authority of Parliament; *thirdly, by charter; and, fourthly, by prescription. In this case, the conservators of the river Tone claim to be a corporation by authority of Parliament. The question then is, has the statute of William made them a corporation? To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident. In the case of the *Sutton Hospital*,† which is the great case on corporations, it is laid down, that the words “incorporo, fundo, erigo” are not, in law, requisite to create a corporation, but that other equivalent words are sufficient. None of those words are contained in this Act of Parliament; and the question is, whether the Legislature has used any equivalent words which shew a manifest intention to incorporate? According to the case of *Marriott v. Mascall*‡ a corporation is a body politic, consisting of material bodies, which, joined together, must have a name to do things which concern the corporation, or else it is no corporation; and in Rolle’s Abridgment, Corporation, 512, citing the *Sutton Hospital* case, it is laid down that the name of incorporation is as a proper name, or a name of baptism. A name, therefore, is essential to a corporation. The Act of Parliament in this case gives a name, viz. “The Conservators of the river Tone.” Then, having a name, do these things which they are empowered to do by this Act shew that they were intended to be a corporation? The Act begins by reciting that “J. Mallett, Esq., in pursuance of a commission under the Great Seal, in the reign of Charles the First, had, at a very great expense, made the river Tone navigable, in consideration whereof King Charles the *Second granted to Mallett and his heirs the sole navigation of the river; and that the interest of Mallett had become vested in the thirty persons therein named.” It then enacts, “that the said thirty persons, and their successors, shall be conservators of the river

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† 10 Co. Rep. 28.

‡ Anderson, 206.

Tone, and shall have power to make and maintain the same navigable." It therefore provides, that the conservators shall have a succession; and then, by a subsequent clause, means are provided for filling up the number of conservators. The first of these clauses, therefore, shews a manifest intent that there should be a succession; and the second contains a provision whereby that succession may be rendered perpetual. Then the conservators are to do certain things towards making and keeping the river Tone navigable. They are to cut a channel through the lands of others, and make wharfs; and as the doing of those things may be prejudicial to the inheritance of persons that have lands adjoining to the river, it is enacted that the conservators shall contract for the loss or damage which any of those persons shall receive by making the river navigable; and if any of the owners of the land and conservators cannot agree touching the value thereof, or if the title in possession, remainder, or reversion, be in an infant, *feme covert*, or any other person unable in law to make a contract concerning any of the said lands, either for the present or so as to bind the inheritance and fee-simple of the same, a jury is to be summoned; and after the jury have assessed the value, and after payment of the money assessed, the conservators may enter on the land; and if the parties interested in the land do not appear, the jury may proceed in their absence to determine the value, and their determination shall be valid, and vest an estate in fee-simple in the conservators and their successors. They *are, therefore, to take lands in succession, as a corporation would do, and not by inheritance as individuals. It then contains a provision for reimbursing the subscribers by tolls, and for lessening those tolls after they shall have been paid the principal advanced and interest; and after they shall have been fully reimbursed, the surplus tolls are to be employed for the use of the poor of the two parishes therein mentioned. It then enacts, that for the better preserving and keeping the river Tone navigable when made so, there shall always be conservators of the said river, and that the persons therein named shall be conservators, to continue during their lives; and that when the number shall be reduced to twenty, the survivors shall choose ten others to make

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up the number thirty, and they are enabled, by the name of "The Conservators of the river Tone, in the county of Somerset," to take and receive any gift, legacy, or grant of goods, chattels, money, or lands in fee, or for any other estate or term for the uses aforesaid. What can be more directly forming them into a corporation, without using the word "incorporate?" It has been held, that if the King grant land to the men of D., *heredibus et successoribus suis*, rendering rent, for any thing touching this land they are a corporation, but for no other purpose.† There it is implied, from the word "successoribus," that the King intended them to be a corporation. It is true, the rendering of rent is there stated to be essential. That may be to shew that the King has not been deceived when he made the grant; but that reason does not apply to the case of a corporation created by Act of Parliament. Besides, the obligation of the conservators to advance money for the purpose of *making the river navigable, and to perform the other duties cast upon them, is equivalent to, and more onerous than the obligation imposed on the men of Dale to pay rent. The Act of Parliament, therefore, contains provisions which shew a manifest intent in the Legislature to make the conservators of the river Tone a corporation; and if that be so, then they are a corporation for all the purposes of keeping the river Tone navigable, and all the incidents of a corporation will attach to them. The case of the *Sutton Hospital*‡ shews that it is not necessary that a thing incident to a corporation should be conferred on it by express words in the charter which makes the corporation. One of the incidents to a corporation is, that it may sue and be sued in its corporate name. The several clauses of the Act of Parliament which I have referred to are amply sufficient to shew that the conservators are a corporation; and if they are, then, as incident to a corporation, they have a right to sue, and are liable to be sued, by their corporate name. Any doubt on that point (if there were any) is removed by the clause which gives a special power to a committee of five of the conservators to make contracts in writing under their hands and seals, and to the

† Rolle's Abr. tit. Corporation, 513 (F), pl. 15. ‡ 10 Co. Rep. 28.

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conservators the right to sue, and imposes on them the liability to be sued on such contracts by the name of the Conservators of the river Tone. Without such a provision they could only sue or be sued in respect of a contract entered into by the corporate body. The Legislature, therefore, by making this special provision, must have assumed, that for all matters done by the corporate body (and not by the committee) they may sue or be sued in their corporate *name. I am therefore of opinion, that the plaintiffs are a corporation, and are entitled to sue as such for any breaches of contract, or for any trespasses committed on their property. * * *

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PARKE, J.:

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I am of the same opinion. There are two questions in this case. First, whether this action is maintainable by the plaintiffs in their corporate name of "The Conservators of the river Tone, in the county of Somerset," for an injury done to their works, locks, ponds, and pens, and real property described in the declaration? Secondly, whether the defendants, who appear to justify under the Bridgwater and Taunton Canal Company, had a right to enter and take a portion of that property by virtue of any power given to the Bridgwater and Taunton Canal Company? As to the first question, it appears that the property on which the injury was committed was acquired by the conservators of the river Tone by the statute 10 & 11 Will. III., and by virtue of an inquisition taken under it in pursuance of the provisions of that statute. By that statute, the land taken under the inquisition is vested in the conservators of the river Tone and their successors. The question is, whether, taking all the provisions of the Act of Parliament together, it appears to have been the intention of the Legislature that they should be a corporation for the purpose of acquiring and holding land? If it does, *then it follows as an incident to their being a corporation, that they may maintain an action for an injury to their corporate property, and that they may plead and be impleaded in their corporate name, without having any special authority for that purpose. It appears to me, from the provisions of the Act of Parliament, that they are made a corporation,

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not by express words, but by necessary implication. There are several authorities collected in Rolle's Abridgment, tit. Corporation, and Viner's Abr. Corporation, which shew that a corporation may be created by charter by implication. One is, "If the King grant land to the men of Dale, their heirs and successors, rendering a rent; for anything touching that land, but not to other purposes, they are a corporation." The condition that the land be subject to a rent may operate in one of two ways. It may prevent the grant from being void for want of consideration. If that be the reason why the reservation of a rent is essential for the purpose of making the men of Dale a corporation, it does not apply to this case. For this is not a grant by the Crown, but by the three estates assembled in Parliament, and there can be no deceit on the Crown. If the reason why a reservation of rent is necessary, be to give the Crown a remedy, then it appears that by reason of the provision of this Act of Parliament the Crown will have a remedy against the conservators; for there are obligations cast on the conservators of the river Tone in respect of that property in which the public have an interest, and obligations equal to or more onerous than that of rendering rent; and the conservators may be indicted for not applying the property to the uses there stated for the benefit of the public. The case, however, does not rest on that; for this Act of Parliament enacts, that there shall always *be conservators, and reserves a power of amotion for misbehaviour; besides they are expressly enabled by the name of "The Conservators of the river Tone, in the county of Somerset," to take lands in fee to them, and their successors. It seems to follow, by necessary implication from this provision, that for the purpose of acquiring and holding real property necessary for maintaining the navigation, they are a corporation; and then it is a necessary consequence that they have a right to maintain an action in their corporate name for an injury done to that property. * * *

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Judgment for the plaintiffs.

SERVANTE AND OTHERS *v.* JAMES.

{10 Barn. & Cress. 410—415; S. C. 5 Man. & Ry. 299; 8 L. J. K. B. 64;
Lloyd & Welsby, 84.)

1829.
Dec. 21.

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Covenant by the master of a vessel with the several part-owners and their several and respective executors, administrators, and assigns, to pay certain monies to them, and to their and every of their several and respective executors, administrators, and assigns at a certain banker's, and in such parts and proportions as were set against their several and respective names: Held, a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action.

COVENANT by E. Servante, R. James, H. Stephens the younger, T. Britton, and J. Bull the younger, (survivors of W. Baker, T. Read, R. Russell, and W. Slocombe,) on articles of agreement made between the plaintiffs and the other parties since deceased, and the defendant; whereby, after reciting that defendant was then commander of a vessel called the *Lord Hobart*, employed in the service of his Majesty's Postmaster-General, and that the several persons whose names and seals were thereunto subscribed and affixed were respectively owners of the said vessel in the several parts, shares, and proportions set against their respective names, it was covenanted, concluded, and agreed by and between the said parties and the defendant in manner and form following; that is to say, that he, the defendant, his executors or administrators, should and would from time to time, and at all times thereafter during so long time as the said ship *Lord Hobart* should be employed in the service of his Majesty's Postmaster-General, and he, the defendant, should continue to be the commander of the said ship, well and truly allow and pay, or cause to be paid, unto the owners or proprietors of the said ship, and to their and every of their several and respective heirs, executors, administrators, and assigns, the yearly sum of 480*l.* of lawful money of Great Britain, or such other sum of money as should be allowed to the owners of the said ship by his Majesty's Postmaster-General for the time being for and as the hire of *the said ship, to commence from the 25th day of August then instant, and to be paid to them by half-yearly payments, at the banking-house of Messrs. Banfield & Co., bankers, Falmouth, or such other bank as the said defendant and the said several and

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^{r.}
 JAMES.

respective owners should at any time thereafter appoint, and in such parts and proportions as were set against their several and respective names, and should and would well and truly pay or cause to be paid half-yearly, and at such banking-house as aforesaid, unto the owners or proprietors of the said ship, and to their several and respective executors, administrators, and assigns, in the parts and proportions aforesaid, one full and equal third part of the amount of the freight of all such coin, money, bullion, and other things for which freight should be paid, as should be from time to time carried and conveyed in such ship during so long time as she should be so employed, and he, the said defendant, should continue commander of her as aforesaid. And it was thereby mutually covenanted, concluded, and agreed upon by and between the parties thereto, that when and in case the said ship should be discharged from the service of his Majesty's Postmaster-General, or he, the said defendant, should die or resign, or otherwise give up or quit the said ship, that then, or in either of the said cases, the cables, anchors, sails, rigging, and other the tackle, apparel, and materials belonging to the said ship, should be valued and appraised by two sets of tradesmen, one set to be chosen by and on the behalf of the said defendant, his executors, administrators, or assigns; and the other set to be chosen by or on the behalf of the said owners or proprietors of the said ship, their executors, administrators, or assigns; and the difference of the value *between such appraisement and the original cost of such cables, anchors, sails, rigging, and all other the tackle, apparel, and materials belonging to the said ship, or the cost of the like articles if they were to be purchased new at the time of such valuation and appraisement as aforesaid, should be made good to the said owners or proprietors, their executors, administrators, and assigns, according to their shares and proportions aforesaid, by the said defendant, his executors, administrators, and assigns, and which he, the said defendant, did thereby covenant and promise for himself and them to make good and pay accordingly, immediately after such valuation should have been made. Averment, that the said William Baker, T. Read, R. Russell, and W. Slocombe, since deceased, and the said plaintiffs, then and there, to wit, on the day and

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year first aforesaid, respectively subscribed their names and affixed their seals to the said articles as executing parties thereto, in manner following; that is to say, the said R. James, H. Stephens the younger, W. Baker, T. Britton, T. Read, R. Russell, and J. Bull the younger, as respectively being each the owner of one sixteenth part or share of the said ship, the said W. Slocombe, as the owner of two sixteenth parts or shares thereof, and Elizabeth Servante, as the owner of six sixteenth parts or shares thereof, to wit, at Falmouth aforesaid, in the county aforesaid. The declaration then proceeded to assign as breaches of these covenants the nonpayment of the money allowed for hire of the vessel, or of one third of that paid for freight of bullion, &c., or of the difference between the valuation of the tackle, &c. made when defendant gave up the command, and the original cost, in the manner stipulated by the *articles of agreement or otherwise. Demurrer and joinder.

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Campbell, in support of the demurrer :

The action is not maintainable by the plaintiffs jointly, the interest in the covenants being several. All the law on the subject is to be found in *Eccleston v. Clipsham*,† and the notes by Serjeant Williams, and the principle clearly established is this, that whatever may be the form of the covenant, the proper parties to the action are to be determined by the interest. If the interest is joint, all the covenantees must join in bringing the action; but if the interest is several, the action must be several, even although the words may suffice to make a joint covenant. If one of several covenantees may sue severally they cannot all join. Here there can be no doubt that any one part-owner of the vessel, whose proportion of the money had not been paid, might have sued for it; or if one had died, his executors might have sued. *Owston v. Ogle*‡ is expressly in point. There the defendant, a ship's husband, agreed with the several part-owners "that after she returned from a certain voyage, a full account should be made out of the ship and concerns, and the neat profits should be divided according to the proportions in the said ship, after deducting all charges and expenses;" and it was held that

† 1 Saund. 153.

‡ 12 R. R. 426 (13 East, 538).

SERVANTE an action by one part-owner alone for breach of this agreement
 v.
 JAMES. was properly brought.

Alderson, contra :

[*414] The principle laid down in *Eccleston v. Clipsham* cannot be disputed; but according to *that principle this action is rightly brought, for the interest in the covenant is joint. The whole sum due to all the covenantees is to be paid into the same bank, or if any other place is appointed for the payment, that is to be done by all the covenantees jointly. It never was intended that the defendant should have power to pay the shares of some of the part-owners to the exclusion of the others; his duty was to pay the money in one sum to the use of all, and the banker was the agent to make a division of it. The covenant, therefore, was in its nature joint, and in this respect differs from the agreement upon which the case of *Owston v. Ogle* proceeded.

BAYLEY, J. :

I am of opinion that there must be judgment for the defendant. The covenants in question are made with the several part-owners of the vessel and their several and respective executors, administrators, and assigns; which latter words would be quite inoperative if the right to sue were in all the parties jointly. Again, the covenant to pay the money is not to pay it to the owners generally, but to pay it to them and their and every of their several and respective executors, &c. at a certain place in such parts and proportions as were set against their several and respective names. He was not to pay it so that the banker might make distribution, but was to make the distribution himself; and if he paid in the proportions of some and not others, each of those would be injured in respect of the nonpayment of his share. In case of the death of one part-owner, by the words of the covenant his personal representative might sue. If the covenant were joint, the executor of the survivor only could maintain an action; but such a construction would be quite at
 [*415] variance with the words **“their several and respective executors,”* &c. Again, if the covenant were joint, a release by any one would defeat an action brought by all, an inconvenience that

the several parties might wish to avoid. For these reasons I think that the language of the covenant is several, and that the interests of the parties are several, and, consequently, that the action brought by all jointly cannot be maintained.

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LITTLEDALE, J. :

I am of the same opinion. The rule laid down in *Eccleston v. Clipsham* is not disputed; and I think that the interest of the parties is several; each is entitled to a separate share of the profits of the ship, and ought to be able to claim his share separately.

PARKE, J. :

The only question is, whether the interest is joint or several; and it seems to me quite clear that it is several. The money was to be paid into the bankers, in several proportions, to the separate account of each part-owner. If it had been paid to their joint account, all must have concurred in any order to draw it out; that would have been very inconvenient, and contrary to the apparent intention of the parties.

Judgment for the defendant.

WARE v. CANN.†

(10 Barn. & Cress. 433—438; S. C. 5 Man. & Ry. 341; 8 L. J. K. B. 164.)

A testator devised lands to A. B. and his heirs for ever; but if A. B. died without heirs, then to C. D. (who was a stranger in blood to A. B.) and his heirs; or if in case A. B. offered to mortgage or suffer a fine or recovery upon the whole or any part thereof, then to go to C. D. : Held, that A. B. took an estate in fee with an executory devise over, to take effect on conditions which were void in law, and that a purchaser in fee from A. B. would have a good title against all persons claiming under the will.

1830.
Jan.
[433]

By an order of the VICE-CHANCELLOR the following case was stated for the opinion of this Court:

William Reynell, deceased, by his will, duly executed and attested for devising freehold estates, after giving specific and pecuniary legacies out of his personal estate, devised in the words following :

† Cited and followed by FRY, J. in *Shaw v. Ford* (1877) 7 Ch. D. 669, 674, 47 L. J. Ch. 531, 533.—R. C.

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[434]

“ And, lastly, as to all the rest, residue, and remainder of my personal estate and lands in South Tawton and in Samford Courtenay, I give unto Richard Ware, son of Richard Ware of North Tawton, and to his heirs for ever ; but if in case the said R. Ware dies without heirs, then to John Powlessland of Spreyton, and his heirs, son of Elisha Powlessland of Spreyton ; or if in case the aforesaid R. Ware offers to mortgage, or suffer a fine or recovery upon the whole, or any part thereof, then to go to the aforesaid J. Powlessland and his heirs.” The said J. Powlessland was a stranger in blood to the said R. Ware. The testator was at the time of making his will, and thence to and at the time of his decease, seised in fee-simple of a certain freehold estate consisting of a farm and land, called Middle Week and Bar Week, in South Tawton, and other distinct estates in South Tawton and Samford Courtenay.

The said R. Ware having filed his bill in the High Court of Chancery against the defendant, a question has arisen in the suit upon the nature of the plaintiff's title to the premises under the said will.

The questions for the opinion of the Court were,

First, what estate and interest the plaintiff took in the devised premises under the said will ?

Secondly, whether if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser's title could be affected by the plaintiff's afterwards mortgaging or levying a fine, or suffering a recovery of the residue of the estate ?

Thirdly, whether if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee against all persons claiming under the said will ? The case was argued in Michaelmas Term by

[435] *Rogers*, for the plaintiff :

The answer to the first question is very clear, for the devise being in the first instance to R. Ware and his heirs for ever, and the devise over being to a stranger in blood, Ware took an estate in fee : *Tilburgh v. Barbut*.† Then the second question comes to this : Can a devise over on alienation by tenant in fee be good ?

† 1 Ves. Sen. 88.

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or perhaps the plaintiff is not even bound to deny that, for here the devise over is on an offer to alien. Now although a condition prohibiting an act be good, yet the prohibition of an offer or attempt is too vague and uncertain, and therefore void ; for an offer is not an issuable fact: *Pierce v. Win*;† and according to that case, where the condition is against the offer to alien, actual alienation is not within the condition. *Bradley v. Peixoto*,‡ and *Mildmay's* case,§ shew that a condition restraining attempts at alienation are void ; and in the latter case the resolutions of the Court clearly distinguish between such restraints of actual alienation as are valid and those which are void. Rightful alienations cannot be restrained : thus, tenant in tail cannot be restrained from suffering a recovery, nor a married woman, to whom, with her husband, a feoffment in fee is made, from joining in levying a fine ; for those are lawful acts, and incident to their estates. But alienation by an infant is against the law : a fine levied by tenant in tail is deemed tortious, and therefore they may be restrained. In Litt. ss. 360, 361, and 362, other cases of conditions restraining alienation are put ; and it is laid down that alienation to a particular person may be restrained, but that alienation generally, being repugnant to the estate given, cannot. *Bradley v. *Peixoto*,‡ and *Ross v. Ross*,|| are express authorities that conditions repugnant to the interest given are void. (He was then stopped by the COURT.)

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Preston, contra :

This is not a mere condition. The first devise is conditional, and the devise over an executory devise to take effect, in the event of a certain thing being done by the first devisee. The restraint does not extend to his heirs, so that the devise over must take effect, if at all within the time allowed by law. But, taking it as a condition, the restraint is good. All restraints of alienation are not void. The King may restrain it, on account of the interest that he has in his tenant, Com. Dig. Condition (D 4) ; and in general restraints against alienation may be imposed

† 1 Ventr. 321 ; Pollerf. 435.

‡ 4 R. B. 7 (3 Ves. 324).

§ 6 Co. Rep. 40.

|| 20 R. B. 263 (1 Jac. & W. 154).

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where a particular estate, as for life or years, is given. The general rule applies to estates in fee and estates tail, but in all cases the question is, whether the condition be or be not repugnant to the estate. *Bradley v. Peixoto*, and *Ross v. Ross*, may be laid out of consideration, for they related to personal property only, which, as to this matter, is governed by the rules of the civil law. It is an admitted principle of law, that a testator, who has given a fee, may impose a qualification by which he retains some portion or reversionary interest which he may dispose of. He may impose a partial restraint on alienation: thus he may restrain alienation to A. or B., or to a class, as to Scotchmen or Irishmen, the rule of law applying only against general restraints of alienation. Here there is no restraint upon the sale of this property; for tenant in fee may alien without making a mortgage, *or levying a fine, or suffering a recovery. The restraint upon alienation, by either of those methods, may be absurd; but there is nothing in our law which prevents a testator from devising over an estate, upon any absurd event, at his pleasure. Then as to the word "offer," it has certainly been said, in several old cases, that an attempt cannot be put in issue; but in modern times the Courts have constantly been called on to try such issues. Thus an assault may be committed by an attempt to strike, and an attempt to commit a felony is an indictable misdemeanor. Such cases are constantly tried, and all attempts and offers are matters proveable by evidence, and therefore issuable.

Rogers, in reply :

It is true that *Bradley v. Peixoto*, and *Ross v. Ross*, related to personalty; but the doctrine contained in them applies equally to executory devises and conditions. A party cannot by the former restrain alienation where he cannot by the latter; the repugnancy of the restraint operates equally in each case. In *Shep. Touch.* 183, after various instances have been stated of conditions void for repugnancy, it is laid down, "And the same law is for the most part of limitations, if they be repugnant, impossible, or against law, as is before shewed to be of conditions."

Cur. adv. vult.

The following Certificate was afterwards sent :

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“ This case has been argued before us by counsel. We have considered it, and are of opinion,

“ First, that the plaintiff took an estate in fee in the devised lands, under the will of William Reynell, with *an executory devise over, to take effect upon conditions which are void in law.

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“ Secondly, that if the plaintiff were to convey a part of the estate to a purchaser in fee, the purchaser’s title would not be affected by the plaintiff’s afterwards mortgaging, or levying a fine, or suffering a recovery of the residue of the estate.

“ Thirdly, that if the plaintiff were to convey the whole estate to a purchaser in fee, the purchaser would have a good title to the fee, against all persons claiming under the said will.

“ TENTERDEN.

“ J. BAYLEY.

“ J. LITTLEDALE.

“ JAS. PARKE.”

READ v. RANN.

1880.
Jan. 26.

(10 Barn. & Cress. 438—441 ; S. C. 5 Man. & Ry. 144 ; 8 L. J. K. B. 144.)

[438]

A ship-broker who has procured a bargain for the hire of a vessel is, by the usage in the city of London, entitled to receive from the owner a certain commission on the amount of freight, if the contract is perfected, but not otherwise: Held, that where a broker had negotiated the hire of a vessel, and a memorandum for a charter was signed by the parties, but the bargain afterwards went off, and the ship was not employed, the broker could not maintain an action against the ship-owner to recover the commission or a compensation for his work and labour.

ASSUMPSIT for work and labour as an agent, and for commission. *Quan. mer.* and money counts. Plea, the general issue. The plaintiff delivered, under a Judge’s order, the following particulars of his demand: “ To commission for letting on hire the ship *Mermaid*, belonging to the defendant, to Captain T. M. Ardlie, on a voyage to and from India, for twelve months, at 12s. per ton per month, which, on 470 tons, amounts to 3,84l. at two and a half per cent., 84l. 12s.” At the trial before Lord Tenterden, Ch. J., at the London sittings after last Michaelmas Term, it appeared that the defendant *was owner of the ship *Mermaid*, and that the plaintiff, a ship-broker, had negotiated with Captain

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Ardlie for the hire of that ship for the voyage, and at the freight specified in the particulars of demand. A memorandum for a charter-party was drawn up by the plaintiff, and signed by the defendant and Ardlie, and it was agreed that the defendant's attorney should prepare a charter-party. The memorandum did not specify by whom the ship was to be kept in repair during the voyage. The owner insisted that the charterer ought to do it; and he, on the other hand, contended that the owner should bear that expense; and on account of this, and some other disagreement as to matters not provided for by the memorandum, no charter-party was ever effected, and the ship was not employed by Ardlie. It was proved to be the custom in the city of London that a ship-broker, procuring a freight for a vessel, was entitled to receive of the ship-owner five per cent. on the amount, provided a complete contract was made; but that where the bargain went off, and the contract was never perfected, the broker did not receive any thing for his trouble in negotiating with the parties. Some witnesses stated, that they thought the plaintiff had done all that was necessary to entitle himself to be paid, although none of them had ever received payment where the contract had not been perfected. Lord TENTERDEN was of opinion that the broker's claim to commission depended on the custom, and that he had not brought himself within it, and that his particulars of demand did not enable him to raise a question as to his being entitled to some remuneration for his work and labour; the plaintiff was accordingly nonsuited; and now

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Gurney moved for a rule *nisi* for a new trial :

The broker, in this case, having done all that was incumbent on him to fix the bargain, was entitled to recover. It was agreed between the parties that he should not prepare the charter-party; and the bargain ultimately went off on account of an unreasonable stipulation which was introduced into the charter-party by the defendant. If that were to protect him against this demand, he would profit by his own wrong; but at all events the plaintiff was entitled to something: several brokers said that they considered he had done all that was necessary to entitle him to be paid. Now he only demanded half the usual commission, which cannot

be considered more than a reasonable compensation for his trouble.

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v.
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BAYLEY, J. :

I am of opinion that the nonsuit was right. The plaintiff claims to be paid, not according to his actual labour, but a sum in proportion to the freight which he procures. That claim is founded on custom, he was therefore bound to prove such a custom as supports his claim. Here, for some cause or other, which we need not examine, the ship was not employed on the voyage contemplated, and in pursuance of the plaintiff's negotiation. What then is the custom under such circumstances? Some witnesses stated that, in their opinion, the plaintiff had done all that was necessary to entitle himself to be paid. But their opinion must not be acted upon, the Court must be guided by that which had been the practice; and not one of these witnesses had, under such circumstances, received payment. Usage is the legal evidence of custom; and upon the evidence it does not appear that there was any such *custom as supported the plaintiff's claim. The whole rested in custom, and that failing, he was not in a situation to claim any thing.

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LITTLEDALE, J. :

I am of the same opinion. The plaintiff claims commission on the ground of his having done all that was incumbent on him, and that the ship did not go on the voyage intended by reason of the owner's misconduct. That depends on the custom, and to prove that, it was necessary that evidence of actual payment, under such circumstances, should be given. No such evidence was given; and, therefore, the plaintiff could not maintain the action for the whole of his demand. Neither was he entitled to any part of it on a *quantum meruit*, for that was never contemplated by the parties.

PARKE, J. :

I also am of the same opinion. The claim of the plaintiff rests on the custom, and not on a *quantum meruit*. The custom supposes a special contract between the parties, and if that is not

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satisfied, no claim at all arises, for no other contract can be implied. In some cases, a special contract, not executed, may give rise to a claim in the nature of a *quantum meruit*, ex. gr., where a special contract has been made for goods, and goods sent, not according to the contract, are retained by the party, there a claim for the value on a *quantum valebant* may be supported, but then, from the circumstances, a new contract may be implied.

Rule refused.

1880.
Jan. 27.

HARRISON v. HODGSON.

(10 Barn. & Cress. 445—446; S. C. 5 Man. & Ry. 392; 8 L. J. K. B. 223.)

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A person may, under particular circumstances, lay hands on another, in order to serve him with process.

TRESPASS for an assault and false imprisonment. Pleas, first, not guilty; secondly, that the plaintiff first committed an assault on the defendant, whereupon he gave him in custody to a peace-officer who was present and saw the breach of the peace. Replication, that plaintiff was employed to serve the defendant with process, and in order to do so, necessarily laid his hands upon him, which was the assault mentioned in the second plea. Rejoinder, excessive violence, and issue thereon. At the trial before Lord Tenterden, Ch. J. at the Westminster sittings after last Michaelmas Term, a verdict was found for the plaintiff; and now

J. Williams moved to arrest the judgment, on the ground that it could not be necessary for the plaintiff to lay hands on the defendant to serve him with process; and that, at all events, the necessity should have been shewn by the replication.

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Per CURIAM:

The defendant, by rejoining excess, has admitted that if in any case it can be necessary to touch a party in order to serve him with process, it was necessary in this instance; and we are not prepared to say that it may not, under particular circumstances, be necessary and lawful to do so. The judgment, therefore, cannot be arrested.

Rule refused.

WATTS v. FRIEND.†

(10 Barn. & Cress. 446—448; S. C. 5 Man. & Ry. 439; 8 L. J. K. B. 181; Lloyd & Welsby, 193.)

1830.
Jan. 28.

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Where A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it on his own land, and sell the crop of seed produced therefrom to A. at 1*l.* 1*s.* the Winchester bushel; and the seed so produced at the price agreed upon exceeded in value the sum of 10*l.*: Held, that this contract was within the seventeenth section of the Statute of Frauds, and void for want of a memorandum in writing.

ASSUMPSIT on a special agreement between the plaintiff and defendant, that the former should furnish the latter with a certain quantity of turnip-seed, which he (defendant) should sow on his own land, and sell and deliver the whole of the seed produced therefrom to the plaintiff, at the price of 1*l.* 1*s.* the Winchester bushel. Averment, that plaintiff supplied the seed; that defendant sowed it, and harvested the crop, but did not sell and deliver the seed produced to the plaintiff, but wholly refused, &c. Plea, the general issue. At the trial before Lord Tenterden, Ch. J. at the Kent Summer Assizes, 1828, the facts stated in the declaration were proved; and also, that the seed produced was 240 bushels, and that the plaintiff could not, at that time, obtain it for less than 1*l.* 10*s.* the bushel; but it was objected, that the contract, which was verbal only, was within the seventeenth section of the Statute of Frauds, and therefore void; and, secondly, that the contract to sell by the Winchester bushel was invalid, by force of the *5 Geo. IV. c. 74,‡ Lord TENTERDEN gave the defendant leave to move for a nonsuit on those points; and the plaintiff having obtained a verdict, a rule *nisi* for a nonsuit was granted in Michaelmas Term, 1828.

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Gurney and *Comyn* now shewed cause, and contended that the case did not fall within the seventeenth section of the Statute of Frauds. It was not a contract for goods and chattels, but for the crop to be produced from seed, which was not even sown at the time when the bargain was made. This is a stronger case than *Towers v. Osborne*,§ *Clayton v. Andrews*,|| or *Groves v. Buck*;¶ for there the contract was for the sale of some articles to

† Sale of Goods Act, 1893, s. 5.

§ 1 Str. 506.

‡ See now Weights and Measures

|| 4 Burr. 2101.

Act, 1878 (41 & 42 Vict. c. 49), s. 19.

¶ 3 M. & S. 178.

—B. C.

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be made, the materials of which then existed. Here the bargain was for a thing of which no part was in existence at the time. *Garbutt v. Watson*[†] is distinguishable; that was a contract for the sale of flour, the wheat from which it was to be made was in existence, and grinding was the only thing necessary to be done before the contract was performed. Then, as to the question on the statute 5 Geo. IV. c. 74, the fifteenth section enacts, "that from and after the 1st of May, 1825, all contracts, bargains, sales, and dealings which shall be made or had within any part of Great Britain and Ireland, for any work to be done, or for any goods, wares, merchandize, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by this Act." Here there was a special agreement for the sale by the Winchester *bushel, the case, therefore, does not come within that part of the section. But the Act goes on, "and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void." This was not an agreement with reference to a measure established by local custom, but to that which was in use as the standard measure all over the country before the statute passed. It is not, therefore, within either branch of the section.

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Spankie, Serjt. *contrà*, was stopped by the Court.

LORD TENTERDEN, Ch. J. :

The rule for entering a nonsuit must be made absolute. According to good common sense, this must be considered as substantially a contract for goods and chattels, for the thing agreed to be delivered would, at the time of delivery, be a personal chattel.[‡] The case, therefore, came within the seventeenth

[†] 5 B. & Ald. 613.

[‡] *Smith v. Surman*, 33 B. R. 259
(9 B. & C. 561).

section of the Statute of Frauds; and the contract being verbal only, and for goods of more than 10*l.* value, was not binding. This being our opinion on the first point, it is unnecessary to decide the other; but I cannot forbear observing, that if a contract for a sale by the Winchester bushel made as this was is to be deemed valid, the object of the statute 5 Geo. IV. c. 74, will be in a great degree defeated.

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Rule absolute.

HOLDSWORTH *v.* JAMES HUNTER THE YOUNGER.†
(10 Barn. & Cress. 449—456; S. C. 5 Man. & Ry. 393; 8 L. J. K. B. 149;
Lloyd & Welsby, 163.)

1830.
Jan. 28.
[449]

The drawee (who was also payee) of a foreign bill of exchange drawn in three parts, accepted and indorsed one part to a creditor to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part for value to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him: Held, that under these circumstances the holder of the part secondly accepted was entitled to recover on the bill against the acceptor, and that the bill being foreign did not require a stamp: Held, also, by Lord TENTERDEN, Ch. J. and PARKE, J., that the acceptor would have been liable on the part secondly accepted, even if the first part had been indorsed and circulated unconditionally.

ASSUMPSIT by the plaintiff as indorsee against the defendant as acceptor of two bills of exchange, one for 5,000*l.*, the other for 4,399*l.* 19*s.* 7*d.*, drawn by M'Kenzie & Co. in the following form:

"5,000*l.*

CALCUTTA, 12th July, 1825.

"At six months after sight pay this, our first of exchange (second and third not paid), to the order of Messrs. W. Hunter & Co., the sum of 5,000*l.* sterling. Value in account.

"T. M'KENZIE & Co.

"To Messrs. JAMES HUNTER, Jun. & Co.

"London."

Plea, the general issue. At the trial before Lord Tenterden, Ch. J. at the London sittings after Michaelmas Term, 1828, the following facts appeared in evidence: The bills of exchange in the declaration mentioned were drawn in Calcutta by M'Kenzie & Co.; and in the month of December, 1825, the defendant

† See Bills of Exchange Act, 1882, s. 71.—R. C.

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[*450]

J. Hunter, who was also a partner in the firm of W. Hunter & Co. (the payees), received the second part of each of these two bills, which he accepted, and indorsed to his father, to *whom the firm of W. Hunter & Co. were largely indebted. The defendant afterwards, in January, 1826, received from M'Kenzie & Co., by a different ship, the other parts of the bills, and accepted and indorsed the first part of each to one Fennell, who indorsed them for value to the plaintiff. The acceptance of these latter parts was ante-dated 14th November, 1825. At the time when they were actually accepted and indorsed, the parts previously accepted were in the hands of the defendant's father; but other bills were afterwards substituted for them, and they were given up to the defendant. Upon these facts, the *Attorney-General* contended, that the plaintiff could not recover for two reasons; first, that the party who first obtained the acceptance of any one part of a set of bills was entitled to the whole of them, and, therefore, the plaintiff could have no right to those parts upon which the action was brought; and for this he cited *Perreira v. Jopp* and another;† secondly, that if *the defendant was to be held bound

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† We have been favoured by the *Attorney-General* with the following note of this case, taken by himself at the trial before Lord Kenyon at Guildhall in 1793:

“Trover for a bill of exchange for 1,000*l.* drawn by persons in Jamaica upon the defendants, in favour of one Jeremiah Mais, and by him endorsed to the plaintiff. The plaintiff gave notice to the defendant to produce the bill, which appeared to be the second of a set of bills drawn in favour of Mais, and dated 5th of December, 1792. The bill was endorsed to the plaintiff as stated in the declaration. The plaintiff then proved that on the 31st of October, 1793, being nearly eleven months after the date of the bill, he presented it to the defendants for acceptance, and upon a subsequent demand they refused to return it. The defendants proved, that one Abraham Levien had absconded in September, 1792; that after he had

[*451, n.]

absconded, the plaintiff purchased a debt due from Levien to Hunter & Co. for 10*s.* in the pound, and obtained the necessary power to attach certain property of Levien's, then in Jamaica, in the hands of the same Jeremiah Mais; that before these attachments were laid against Mais in Jamaica, viz. on the 5th of December aforesaid, Mais had transmitted the first of the same set of bills of which the second was now in question, endorsed to A. Levien; that in consequence of Levien's absconding, the *letter enclosing the said first bill to him did not come either to his hands or to those of his assignees, he being a bankrupt, until the 8th of November, 1793; that in the mean time, the plaintiff having heard of the transmission of the first bill of the set, and that it had not made its appearance, wrote out to Jamaica, and, by means of an indemnity, prevailed upon Mais to endorse

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by his acceptance of a second part, it must be treated as altogether a separate bill drawn, as well as accepted, in England, and, therefore, liable to the stamp-duty; and that as the bills in question were not stamped they were invalid. *Pollock, contra*, contended, that it was a question for the jury, whether there ever had been a perfect unconditional transfer of the parts first accepted to the father? or, whether they were only deposited with him until other securities were provided? If the latter were the case, then, as soon as these parts were restored to the acceptor, the *jus tertii* ceased, and could not be set up as an answer to the action. Lord TENTERDEN was of that opinion, and left the question to the jury, directing them to find for the plaintiff if they thought

and transmit the second of the bills to him, which arrived on the 31st of October, 1793, and was retained by the defendants upon presentation, in consequence of a notice given to them by the assignees of Levien of the circumstances; that a few days afterwards the letter containing the first bill endorsed to Levien was discovered. This bill was produced in Court, and it appeared to be the first bill of the same set of which the second was claimed by the plaintiff. Upon this evidence Lord KENYON, Ch. J. thought the defendants clearly entitled to a verdict, because the sum which that bill represented had never been attached in the hands of Mais, he having endorsed and transmitted the first bill to Levien before the attachment could operate; consequently, the property represented by that bill, and in the hands of defendants the drawees, was vested in Levien or his assignees, and the endorser Mais could not divest that property by endorsing the second bill to the plaintiff; the plaintiff had, therefore, no title to the money which these bills represented.

“*Mingay*, for the plaintiff, then observed, that if the plaintiff was not entitled to the 1,000*l.*, he had at least a right to the piece of paper which

he ‘had left at the defendants’, and which they refused to return.

[452, n.]

“But Lord KENYON denied this, and mentioned a case of *Miller and Race*, tried by Lord MANSFIELD, in which this very point was contested in an action of trover for a promissory note; in which Lord MANSFIELD said, he could never bring himself to think for a moment that a man who had no title to the value of a bill or note, could recover in an action for trover for the paper merely, which was of no value whatever. Upon this Lord KENYON continued, that *Sir Richard Lloyd* put this case to Lord Mansfield, whether, if instead of a piece of paper a diamond ring had been given for a promissory note, the person who possessed the ring, though without title to the value it represented, might not bring trover for it? To this Lord MANSFIELD replied, that the case was very ingenious, and that he might not, perhaps, without some consideration, be able to answer it satisfactorily; but yet, it did not shake his opinion, that the plaintiff ought not to recover for the piece of paper under the circumstances of the case before him.

“*Mingay* then chose to be nonsuited.”

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that the parts of *the bills first accepted were delivered to the defendant's father to be kept only until other securities were given. The jury found that they were so given, and returned a verdict for the plaintiff. In Hilary Term, 1829, a rule *nisi* for a new trial was obtained on the objections made at the trial, and also, that the question of fact ought not to have been left to the jury.

F. Pollock and Patteson now shewed cause :

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The bills in this case having been drawn on the defendant, and in effect payable to his own order, all the parts were transmitted to him, and he was thereby enabled to accept and put forth more than one of them. Now, although it may be true that, as far as the drawer is concerned, the part first accepted is alone available, so that he cannot be charged more than once upon the same set of bills, yet there is no case or principle of law to prevent the drawee from accepting all the parts, and making himself liable three times over. In the case of *Perreira v. Jopp* there never was any intention, in any of the *parties, to be liable more than once. Besides, in fact, this defendant has not been charged more than once; the parts delivered to his father were deposited as a security for a debt, and afterwards delivered up upon the substitution of other securities; they have never been paid. Then as to the second point, no stamp is necessary on a bill drawn in Calcutta to be accepted in England. Unless, therefore, the bill is to be considered as altogether concocted in England, the objection fails; but it cannot be so considered without making the defendant guilty of a forgery, and the Court will not allow him to set up his guilt as an answer to the action.

The Attorney-General and Campbell, contra :

The case of *Perreira v. Jopp* established that when there are several parts of a foreign bill, they form together but one bill, and he who has the first title to any one part has a right to the others also. Here one part of each bill was first endorsed to the defendant's father, for a valuable consideration. It was left as a question to the jury, whether they were so endorsed in order that he might sue upon them, or only keep them until others

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were substituted ? but there was no evidence for the jury of such an agreement having been made, and, in fact, the bills were in the father's hands, and he had a legal right to them at the time when the other parts were indorsed to the plaintiff. The property, in those parts, was, therefore, in the father. In order to obviate this difficulty, the plaintiff must treat them as separate bills ; but then they must be considered as emanating entirely from the defendant, not as forgeries on M'Kenzie & Co. at Calcutta, but as drawn in England in the name of a fictitious person, and, consequently, liable to stamp duty.

LORD TENTERDEN, Ch. J. :

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According to the verdict of the jury, the delivery of the bills to the defendant's father was not absolute but conditional, and I think that the facts of the case justified that finding. The parts first accepted cannot, therefore, be said to have been paid, for they were redeemed by the substitution of other securities. That being so, what was there to prevent the defendant from putting in circulation another part of the bills ? But I am inclined to go further, and to say that the plaintiff would have been entitled to recover, even if the transfer to the father had been absolute and unconditional. For suppose two parts of a foreign bill come to the hands of the drawee, he accepts both, and indorses first one part to A. and afterwards the other part to B. In any question as to property between them, A. might be entitled to both. But the question here is, whether the acceptor and indorser shall be allowed to defend himself against the holder of the one part, on account of the previous circulation of the other part ? I am not aware of any principle of law upon which such a defence can be supported. But it has been further contended, that this bill must be considered as drawn in England, and therefore liable to the stamp-duty. That would be to put the law in opposition to the fact, for we know that the bill was actually drawn in Calcutta ; and I think we ought not to strain the Stamp Act to meet such a case as this. If the bill had, in fact, been drawn in England, though purporting to be drawn in Calcutta, the case would have been different. For these reasons the rule must be discharged.

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BAYLEY, J. :

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Where a bill is drawn in sets, the party claiming as holder ought to have all the parts, for the payment of any one part to another person may defeat *him. Here there were three parts ; and it so happens that all of them were sent to the drawee, who was also payee, and he had power to deal with them in those two characters. He accepted two parts, and the plaintiff claims on one of those as indorsee. The other was indorsed by the defendant to his father, and that indorsement was prior, in order of time ; and if it had been unconditional, and payment had, in fact, been made to the father, there might have been a difficulty in the case which does not now exist. The indorsement to the defendant's father was conditional only, and the other indorsement to the plaintiff is clearly available, the father not having insisted on payment to himself. By the acceptance, the defendant undertook to pay that first of exchange, the second and third not being paid. They have not been paid, and no one has a valid claim on them ; the plaintiff is therefore clearly entitled to recover on the first part.

LITLEDALE, J. :

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I agree in thinking that the plaintiff was entitled to recover. First, it seems to me that a stamp was not necessary to these bills. They were, *bonâ fide*, drawn in Calcutta as foreign bills ; and even if they be considered binding on the defendant by estoppel, as separate bills, they cannot be treated as drawn in London. I feel some difficulty, however, in putting the case on this ground, for I think that the doctrine of estoppel is not to be imported into a transaction taking effect by the usage and custom of merchants. The three parts of each set originally formed but one bill, and the defendant could not divide it into two or three. But upon the other ground, I am of opinion that the plaintiff is entitled to retain the verdict. The defendant *can only be liable on one part ; and if one part had, in the first instance, been indorsed unconditionally to his father, he would not have been liable to the plaintiff ; but as it was conditional, and the father afterwards waived that indorsement and gave up the bills, the indorsement of the other part to the plaintiff is binding.

PARKE, J. :

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I concur in thinking that the verdict for the plaintiff was right. The action was on two foreign bills accepted by the defendant. But it was said in defence that he had before accepted another part of each bill, and endorsed it away for value. Assuming that to be so, still I think that, although the defendant had not after so doing, power to bind the drawer, he is estopped from disputing the regularity of his own acceptance. I cannot agree that the doctrine of estoppel is inapplicable to bills; for an acceptor is always estopped from disputing that the bill was regularly drawn. Then as to the question on the Stamp Act, it clearly is not a foreign bill within the schedule of the 55 Geo. III. c. 104, nor is it an inland bill, for it was not drawn in England. *Snaith v. Mingay*† appears to be exactly in point, where LE BLANC, J. observes, "Whether this was a perfect bill in Ireland is not so much the question as whether it was a bill drawn in England." So here the question as to the stamp is, was this bill drawn in England; certainly it was not; and we ought not by construction to extend the provisions of the Stamp Act to meet such a case as this. The rule for a new trial must, therefore, be discharged.

Rule discharged.

DOE D. J. A. WIGAN v. JONES.

(10 Barn. & Cress. 459—468; S. C. 5 Man. & Ry. 563; 8 L. J. K. B. 214.)

1830.
Feb. 12.
[459]

In 1822 an estate was conveyed to such uses as A. B. should by deed, &c. appoint, and in the mean time to the use of himself for life, &c. In 1826 a judgment was obtained against him, and in 1827 he mortgaged this estate, and appointed the use to C. D. for 500 years. After the execution of this deed, the judgment creditor issued an elegit: Held, that his lien upon the land was defeated by the execution of the power.

EJECTMENT for lands in the parish of Mayfield, in the county of Sussex. The demise was laid on the 12th day of April, 1828. At the trial before Garrow, B., at the Summer Assizes for Sussex, 1828, a nonsuit was directed by the learned Judge, with liberty to the plaintiff to move to set it aside and enter a verdict for the plaintiff; and if the Court should order a case or special verdict, to be turned into one accordingly. On motion to this Court, they

† 1 M. & S. 87.

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ordered the facts to be stated in a case, and the case to be turned into a special verdict, should either of the parties deem it expedient. The case was as follows :

In Michaelmas Term, 1822, a judgment was entered up against Thomas Baker, at the suit of the defendant Thomas Jones, for the sum of 6,000*l.* ; and on the 18th of December, 1827, the said T. Jones sued out a writ of *elegit* on the said judgment, directed to the sheriff of the county of Sussex, and on an inquisition duly taken on the said writ and finding the seisin of the said T. Baker, the sheriff delivered the lands in question to the defendant, as his free tenement, according to the statute in that behalf, until he should thereof have fully levied the debt and damages in the said writ mentioned.

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The seisin and title of T. Baker, the debtor, commenced with and under indentures dated the 29th and 30th days of November, 1826, and by these indentures the lands in question, and taken in execution under the said writ of *elegit*, were conveyed to the following uses ; viz. to such use and uses, and to and for such estate and *estates, interest and interests, ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to, with, and under such powers, provisoes, conditions, limitations, declarations, and agreements as the said T. Baker at any time or times, and from time to time thereafter, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by him, the said T. Baker, in the presence of, and to be attested by, two or more credible witnesses, should direct, limit, or appoint ; and in default of, and until such direction, limitation, or appointment, or in case any such should be made, then subject thereto ; and when and as the estate or estates, interest or interests thereby directed, limited, appointed, or created, should respectively end and determine, and in the mean time subject thereto ; and as to such part or parts of the same several hereditaments and premises, and all such estate and interest therein of which no such direction, limitation, or appointment should be effectually made as aforesaid ; to the use of the said T. Baker and his assigns, for and during the term of his natural life, without

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impeachment of waste; and from and after the determination of that estate, by any means, in his lifetime, to the use of Beriah Drew and his executors and administrators, during the natural life of the said T. Baker, in trust nevertheless to the only use and benefit of the said T. Baker and his assigns, and to permit and suffer him and them to receive and take the rents and profits thereof to his and their own use and benefit; and also to prevent any wife of him, the said T. Baker, from being entitled to dower out of or in the premises, or any part thereof, and from and after the determination of the estate so limited in use to the said Beriah Drew *and his executors and administrators during the natural life of the said T. Baker, in trust as aforesaid, and in the mean time subject thereto, to the only proper use and behoof of the said T. Baker, his heirs and assigns for ever.

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By indenture dated the 29th of March, 1827, and made between the said T. Baker of the one part, and the said J. A. Wigan of the other part, being an indenture duly executed and attested according to the said power, (after reciting the said indentures of lease and release, and stating in that recital the said power, and also reciting the transaction or loan of money, and after reciting that the said J. A. Wigan being satisfied that the hereditaments thereafter described were a sufficient security for the repayment of the sum of 4,000*l.* and interest, had agreed to accept a mortgage for the same, and release other hereditaments situate at West Malling and East Malling from the charge or lien created by the therein recited bond, and by such deposit of the title-deeds relating thereto, as in the said bond mentioned,) it was witnessed, that in pursuance of the therein recited agreement, and in performance of the condition of the therein recited bond, and in consideration of 4,000*l.* so due to the said J. A. Wigan from the said T. Baker as aforesaid, and for a nominal consideration, he, the said T. Baker, pursuant to and in execution of the said power or authority given, limited, or reserved to him in and by the said indenture of release, and of all other powers or authorities, did direct, limit, and appoint that the messuage, lands, and hereditaments thereafter described, with their appurtenances, should thenceforth remain, continue, and be, and that the thereinbefore recited indenture of the 30th of November, 1826, should

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thenceforth operate and enure to the use of the said *J. A. Wigan, his executors, administrators, and assigns, for and during the term of 500 years, to commence and be computed from the day of the date of the then reciting deed, and fully to be complete and ended, without impeachment of waste, subject, nevertheless, to the proviso for cesser thereafter contained. And it was further witnessed, that in further pursuance of the said agreement, and for the consideration aforesaid, the said T. Baker did grant, bargain, sell, and demise unto the said J. A. Wigan, his executors, administrators, and assigns, divers hereditaments situate at Mayfield, and including all the lands in question, to hold the same unto the said J. A. Wigan, his executors, administrators, and assigns, for and during the aforesaid term of 500 years, to commence and be computed as thereinbefore was mentioned, without impeachment of waste, with a proviso for cesser of the said term if the said T. Baker, his heirs, executors, administrators, or assigns, or some of them, should pay to the said J. A. Wigan, his executors, administrators, or assigns, the sum of 4,000*l.* on the 11th day of October, 1829, with interest for the same at the rate of 5 per cent. per annum, to be paid half-yearly, on the 6th day of April and the 11th day of October, in the mean time, without making any deduction or abatement out of the said several payments. And it was agreed that until default should be made in payment of the said sum of 4,000*l.* and interest, or some part thereof, contrary to the true intent of the deed, it should be lawful for the said T. Baker, his heirs and assigns, peaceably and quietly to hold and enjoy the premises, and to receive the rents thereof, for his and their own use, without any hinderance, suit, eviction, claim, or demand whatsoever by the said J. A. Wigan, his heirs or assigns, or any other person *or persons claiming or to claim by, from, or under him, them, or any of them. The said T. Baker made default in payment of the interest before the day on which the demise was laid. This case was argued in last Michaelmas Term by

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Preston, for the plaintiff :

The question in this case is, whether priority is to be given to the judgment creditor or the mortgagee? The judgment, no

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doubt, attached before the appointment was made; but by the appointment the debtor defeated his own estates for life and in fee, by making the title of the mortgagee depend on the power of appointment and not on his own estates. The title of the appointee is the same as if it had been inserted in the deed creating the power, and, therefore, takes precedence of the judgment. *Sir Edward Clere's case*,† *Roach v. Wadham*,‡ *Ray v. Pung*,§ and *Maundrell v. Maundrell*,|| fully support this position. The first depended on the law of tenure; and there a man seised of three acres of land, which he held *in capite*, made a feoffment of two acres to the use of his wife for life for her jointure, and afterwards made a feoffment of the third acre to the use of such persons, and for such estates, as he should appoint by will; and it was held that he might, by such appointment, well dispose of the third acre, although by the Statute of Wills he could only have devised two thirds. In *Roach v. Wadham* lands were conveyed to A. in fee, to the use of such persons and for such estates as B. should by deed or will limit or appoint; and for default of appointment to the use of B. in fee, yielding and paying a *certain rent, which B. thereby covenanted to pay. A. and B. conveyed the estate to C., by way of appointment, and it was held that C. was not liable to the rent or covenant as assignee of B. In *Ray v. Pung* the right of a wife to dower was held to be barred by the execution of a power of appointment; and that can hardly be distinguished from this, for the right of the wife attached before the execution of the power, but was afterwards defeated by it. In *Maundrell v. Maundrell* Lord ELDON, C. says that “the fee vests until execution of the power, and the execution of the power is the limitation of a use under and by the effect of the instrument by which the power was reserved.” Besides all these authorities, there is the case of *Witham v. Bland*,¶ published since the present question arose, where it was held that a sequestration was defeated by the execution of a power of appointment. Now a sequestration in equity is like a judgment at law, this authority, therefore, is directly in point.

[*464]

† 6 Co. Rep. 18.

‡ 6 East, 289.

§ 5 B. & Ald. 561.

|| 7 R. R. 393 (7 Ves. 567; 10 Ves. 246, 255).

¶ 3 Swanst. 277, n.

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Richmond, contra :

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This attempt to defeat a judgment creditor is entirely new, and cannot be supported. Judgments bind the land by the Statute West. 2, c. 18, and in *Sir J. Moleyn's* case† it was held that, if a person against whom a judgment is recovered has lands which he afterwards aliens, the creditor may have execution of them, or if he acquires lands after the judgment they also are liable. Again the statute 19 Hen. VII. c. 15, made uses subject to judgment creditors, now powers are but a modification of uses; and the Statute of Frauds, 29 Car. II. c. 3, extends the remedy to lands held in trust for the debtor. But it is said that this *general right to have execution of the lands of the debtor does not extend to cases where there is a power of appointment. The abstract idea of powers had no place at common law; no man was allowed to convey what was not vested in him. But when uses were introduced they came to be defined as the right to direct conveyances of the estate, and the right to the rents and profits in the mean time; and now, certainly, the possibility of a power existing independently of the fee must be admitted. To hold, however, that a power appendant would defeat all acts done before the execution of it, would have worked so great injustice, that it was at an early period decided that all acts and charges of the party suspended the power or defeated it *pro tanto*. Thus, “if tenant for life, with power to make leases or revoke, grants a rent-charge, and then makes a lease according to his power, the lessee shall hold it charged during the life of tenant for life; for he hath power to charge his own interest, which, by his own act, cannot be avoided”: *Gilb. on Uses*, 142, and per *HALE*, C. B., in *Edwards v. Slater*.‡ Neither can a lease granted by the party be defeated by the subsequent execution of a power: *Snape v. Turton*,§ *Yelland v. Fielis*,|| and per *WALMSLEY*, J. in *Bullock v. Thorne*,¶ *Goodwright v. Cator*.†† Perhaps it may be said that the lien of a judgment differs from a lease or rent charge, because it is a proceeding *in invitum*. Judgments, however, are not always *in invitum*, and there are instances in which

† 30 Edw. III. 24, a.

‡ Hardr. 415.

§ *Sir W. Jones*, 392.

|| *Moore*, 788.

¶ *Moore*, 618.

†† *Doug.* 477.

proceedings *in invitum* have been held to supersede powers; thus the bargain and sale by *commissioners of bankrupts has that effect: *Doe v. Britain*.† And in Bro. Abr. Feoffment al Uses, pl. 25, a judgment-creditor is assimilated to a grantee. It is said that this cannot be distinguished from a case of dower, but there are several distinctions, and it seems rather to resemble the proceedings against a debtor by suing out a commission of bankrupt. Dower is a lien not to take effect until the death of the husband, a judgment is a lien from the time when it is entered up. Dower binds at common law, judgments by statute. Dower is allowed to be defeated by the assignment of a term with notice: *Mole v. Smith*,‡ a judgment-creditor is not. Suppose the judgment-creditor had actually been in possession under the elegit, if the argument for the plaintiff is good, he might have been turned out, and the same argument would extend to cases of extents at the suit of the Crown; but that they cannot be so defeated was decided in *Rex v. Smith*.§ The whole of the argument on the other side depends on the assertion that the appointee does not come in under the appointor but under him who created the power of appointment. That is true, so far as feudal purposes are concerned, but for many purposes he does come in under the appointor. Thus, a deed executing a power over a real estate has been held to be a conveyance so as to come within the statute Eliz. as a fraudulent conveyance.|| So also the appointee must claim according to the nature of the instrument;¶ and in *Scrafton v. Quincey*,†† a deed of appointment of lands in a register county was postponed to a mortgage made after it, but which was registered before it.

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Preston, in reply :

According to the judgment of Lord HARDWICKE in *The Duke of Marlborough v. Godolphin*, the meaning of the expression “that persons must take under the power, or as if their names had been

† 2 B. & Ald. 93.

‡ Jacob, 490.

§ Sugd. V. & P. App. No. 16.

|| See *The Duke of Marlborough v. Godolphin*, 2 Ves. Sen. 65, where it was said *arguendo*, that the then LORD

CHANCELLOR had so decided, and not denied by him.

¶ 2 Ves. Sen. 77.

†† 2 Ves. Sen. 413. But in this case the mortgage deed was registered before the deed creating the power.

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inserted in the power " is, that they shall take in the same manner as if the power and the instrument executing the power had been incorporated in one instrument; then they shall take as if all that is in the instrument executing had been expressed in that giving the power, and this agrees with the opinion of Lord ELDON in *Maundrell v. Maundrell*. Now, if the mortgage to Wigan had been inserted in the instrument creating the power, there could have been no doubt of his having priority over the judgment-creditor.

Cur. adv. vult.

The judgment of the COURT was delivered in the course of this Term by

LORD TENTERDEN, Ch. J. :

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This was a special case, argued during the last Term. It appeared by the case that in Michaelmas Term, 1822, a judgment was entered up against T. Baker at the suit of the defendant, who, on the 18th of December, 1827, sued out an elegit, under which the lands in question were delivered to him by the sheriff. In the mean time, between the entering up of the judgment and the execution of the elegit, viz. in November, 1826, the then defendant, Baker, *had acquired these lands by a conveyance to such uses as he might appoint, and in the mean time to the use of himself for life, and so forth. In March, 1827, Baker mortgaged the estate for 4,000*l.* to the lessor of the plaintiff, and appointed the use to him for 500 years; and the question for the Court was, Whether this conveyance, under the power of appointment, defeated the judgment-creditor? It has been established ever since the time of Lord Coke, that where a power is executed the person taking under it takes under him who created the power, and not under him who executes it. The only exceptions are, where the person executing the power has granted a lease or any other interest which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore falls within the rule. We are, therefore, of opinion that the nonsuit must be set aside, and a verdict entered for the plaintiff.

Postea to the plaintiff.

COOPER v. J. MEYER AND W. B. MEYER.†

(10 Barn. & Cress. 468—471; S. C. 5 Man. & Ry. 387; 8 L. J. K. B. 171; Lloyd & Welsby, 172.)

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Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as the drawer; and, therefore, an indorsee may bring evidence to shew that the signatures of the supposed drawer, to the bill and to the first indorsement, are in the same hand-writing.

ASSUMPSIT by the indorsee against the acceptors of several bills of exchange, some of which were drawn in the name of Woodman, and others in the firm of H. Ullock & Co., payable to the order of the drawer. Plea, the general issue. At the trial before *Lord Tenterden, Ch. J., at the Guildhall sittings after Michaelmas Term, 1828, bills corresponding with those set out in the declaration were produced, and the hand-writing of the acceptors proved, and also that the bills were accepted by them for the accommodation of one Darby. The bills drawn in the names of Woodman and Ullock & Co. were indorsed respectively with those names and by Darby, for whom the plaintiff discounted them; and two witnesses for the plaintiff, who knew Darby's hand-writing, stated, that they believed the names of the drawers and first indorsers to have been written by him. For the defendant, a person named Woodman, a cousin of Darby, was called, who proved that the name Woodman was not signed by him, and that he never authorised Darby to draw or indorse bills in his name; and similar evidence was given by a member of a firm of T. Ullock & Co., and no evidence was given of the existence of other persons answering the description of the drawers of these bills. Then a witness was called, who stated that he did not think the names of the drawers and first indorsers were written by Darby; and on cross-examination he was asked by the counsel for the plaintiff, whether he believed the bills to have been signed and indorsed by the same person? This was objected to as a comparison of hand-writing. Lord TENTERDEN allowed

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† Followed in *London & S. W. Bank v. Wentworth* (1880) 5 Ex. D. 96, 49 L. J. Ex. 657. And see Bills of Exchange Act, 1883, s. 7 (3), as interpreted in *Bank of England v. Vagliano*, '91, A. C. 107, 60 L. J. Q. B. 145.—R. C.

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the question to be put, and the witness answered it in the affirmative. His Lordship, in summing up, told the jury, that as there was no proof of the existence of such persons as Woodman and H. Ullock & Co., in whose names the bills were drawn, it was sufficient, as against the acceptor, to prove the indorsement to be in the same hand-writing as the drawing; but he also desired them to say, whether upon the evidence *they believed the bills to have been drawn and indorsed by Darby. The jury said that they did, and found a verdict for the plaintiff. In Hilary Term a rule *nisi* for a new trial was obtained, on the ground that the witness should not have been allowed to answer the question objected to at the trial, and that the question was not properly presented to the jury.

The Attorney-General and Campbell shewed cause :

There is no doubt that as a general principle it is wrong to admit proof of writing by a comparison of hands. But this case was very peculiar. The bills appeared to have been drawn in fictitious names, and the question put and objected to was not whether the witness could say that the indorsement was written by A. or B., by comparing it with some other writing, but whether the bills had been drawn and indorsed by the same person. Then the question put to the jury was wholly unexceptionable, viz. whether they believed the bills to have been drawn and indorsed by Darby? and there was abundant evidence to warrant their answer in the affirmative.

Gurney, F. Pollock, and Ashmore, *contrà* :

The bills in question were accepted by one of two partners, in the name of the firm. But one partner cannot bind another by accepting a bill which is a forgery; and the bills in question, drawn in fictitious names, were so. Or, waiving that point, although the defendant, by accepting the bills, gave credit to the writing of the drawer, yet he might dispute the indorsement: *Robinson v. Yarrow*,† and therefore the indorsement should have

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*been proved in the ordinary way. The evidence that the drawing and indorsement were by the same hand ought not to have

† 18 R. R. 537 (7 Taunt. 455).

been admitted. If it was admissible in this case it would be equally admissible in all others; for the acceptor is always precluded from disputing the hand-writing of the drawer.

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LORD TENTERDEN, Ch. J.:

I am of opinion that both the defendants are bound by these acceptances. It is clear that they were given on Darby's credit, and indeed the jury found that he drew and indorsed the bills. The acceptor ought to know the hand-writing of the drawer, and is, therefore, precluded from disputing it; but it is said that he may, nevertheless, dispute the indorsement. Where the drawer is a real person, he may do so; but if there is, in reality, no such person, I think the fair construction of the acceptor's undertaking is, that he will pay to the signature of the same person that signed for the drawer. The rule for a new trial must, therefore, be discharged.

BAYLEY, J.:

The defendants ought not to have accepted the bills without knowing whether or not there were such persons as the supposed drawers. If they chose to accept without making the enquiry, I think they must be considered as undertaking to pay to the signature of the person who actually drew the bills.

PARKE, J. concurred.

Rule discharged.

FISHER v. CLEMENT.†

(10 Barn. & Cress. 472—476; S. C. 5 Man. & Ry. 730; 8 L. J. K. B. 176.)

In an action for a libel, where the language is ambiguous, and it is doubtful whether it imputes any injurious matter to the plaintiff; the proper question for the jury is not whether the intention of the publisher be to injure the plaintiff, but whether the tendency of the matter published be injurious to him.

DECLARATION in the Common Pleas stated, that one Stockdale had falsely, &c. published a libel, (contained in a work entitled the Memoirs of, and purporting to be written by, one Harriet

† Considered and substantially followed in *Capital and Counties Bank v. Henty* (H. L. 1882) 7 App. Cas. 741, 767, 52 L. J. Q. B. 232, 254.—R. C.

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Wilson,) which imputed gross misconduct to the plaintiff; that the plaintiff brought his action against Stockdale in the Common Pleas, and recovered by verdict 700*l.* damages; that the defendant contriving, &c. to injure the plaintiff in his good name, and to cause it to be believed that the said libel was true, and that the plaintiff was guilty of the misconduct thereby imputed to him, published of and concerning the plaintiff, and of and concerning the said libel, and of and concerning the said verdict, the false, scandalous, malicious, and defamatory libel, containing the false, scandalous, malicious, and defamatory matter following. It then set out the libel, which purported to be a dialogue between Stockdale and Harriet Wilson. The tendency of it was undoubtedly to hold up to ridicule and contempt Stockdale the publisher, and Harriet Wilson the supposed author, of the Memoirs, in which the first mentioned libel was contained. In the course of the dialogue two verdicts obtained in actions brought against Stockdale, for libels contained in Harriet Wilson's Memoirs, were alluded to; one, in which Fisher the plaintiff had recovered 700*l.*, and the other, in which another person had recovered 300*l.*; and Harriet Wilson was made to state generally, that what she wrote in her Memoirs was in substance *true, and in particular, that what she had written of the person who had obtained 300*l.* damages against Stockdale was true. Stockdale is then made to say, "What say you to *Fisher's* case?" Harriet Wilson's reply was, "That I could answer in its place." There was no other allusion to the plaintiff in the course of the publication. The plaintiff having obtained judgment in the Common Pleas, that judgment was reversed in this Court, and a *venire de novo* awarded.† The cause was tried before Lord Tenterden, Ch. J. at the London sittings after Trinity Term, 1828. The alleged libellous matter was proved to have been published by the defendant in a weekly newspaper called *Bell's Life in London*. It was contended that the tendency of the publication was injurious to Stockdale and Harriet Wilson only, and not to the plaintiff. Lord TENTERDEN, in addressing the jury, said, that the question was what the intention of the publication was; and he directed them to consider whether it was intended to cast a reflection on

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† *Clement v. Fisher*, 7 B. & C. 459.

the character of the plaintiff, and to insinuate that the libellous matter which formed the subject of the action against Stockdale was true. If they were of that opinion they should find for the plaintiff, but if they thought the object was not to reflect upon the plaintiff's character, but merely to expose and hold up to public contempt the writer and publisher of Harriet Wilson's Memoirs, they should find for the defendant; and in conclusion he directed them to find for the plaintiff, if any person from reading the matter complained of could conceive an unfavourable opinion of the plaintiff. The jury having found a verdict for the defendant, a rule *nisi* *had been obtained for a new trial, on the ground that the intention of the publication ought not to have been submitted to the jury; that they ought to have been directed to find for the plaintiff if they thought the tendency of the libel was to cast an unfounded imputation on the plaintiff.

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The *Attorney-General*, *Brougham*, *Denman*, and *Platt*, now shewed cause :

It must, undoubtedly, be conceded that, generally speaking, the intention of a writer or publisher of a libel is an inference of law arising from the publication of matter injurious to the reputation of another, and, therefore, where, as in this case, it was doubtful from the libel whether it was calculated to injure the character of the plaintiff, the proper question for the jury was, whether that was the tendency of the publication? That question was substantially left to the jury; for assuming that they were told to consider what the intention of the publication was, that expression, though not very accurate, implies the intention of the author or publisher to be collected from the publication itself. But assuming that to be ambiguous, the jury were told to find for the plaintiff, if they thought any person, reading the matter complained of, would receive an unfavourable impression of the plaintiff.

Campbell and *Manning*, *contra* :

The mode in which the question was left to the jury was calculated to lead them to think that they ought to find for the defendant, if the publisher or writer of the libel had any other

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intention than that which the law would infer from the injurious tendency of the publication. Now malice in law (which imports a wrongful act done intentionally without just cause or *excuse) is implied from the publication of any false charge or slanderous matter: *Bromage v. Prosser*,† upon the general principle, that where a man uses noxious and injurious means, he must be presumed to have contemplated and intended the injurious, but natural, consequence of using such means.‡

LORD TENTERDEN, Ch. J. :

I have not any distinct recollection of the precise mode in which I left this case to the jury; but assuming that I told them to consider what the intention of the publication was, and afterwards added, that if they thought any person, from reading the matter complained of, could conceive an unfavourable impression of the plaintiff, they ought to find in his favour, I think that, although I did not present the case to them with that accuracy of expression which I ought, the direction was substantially correct, and such as men, not of professional habits, would understand as importing that they were to find for the plaintiff if they thought the tendency of the libel was injurious to him. I could hardly have left the intention of the writer or publisher to the jury as a question independent of, and distinct from, the tendency of the publication; for I have always entertained an opinion, and frequently expressed it, that a person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act. I think that, taking the whole of the direction together, the jury must have understood me as directing them to find for the plaintiff, if they thought the tendency of the libel was injurious to him.

[476] BAYLEY, J. :

It seems to me that the question was put properly to the jury, whether it was the intention of the defendant to represent that the plaintiff was guilty of the acts imputed to him in the first

† 28 R. R. 241 (4 B. & C. 247).

‡ Starkie on Libel, Preliminary Discourse, lxxv.

libel; for they were afterwards told to find for the plaintiff, if they thought any person reading the paragraph alluded to would conceive an unfavourable impression of the plaintiff. The jury, therefore, must have understood that they were to collect the intention of the defendant from the libel itself, and that was, undoubtedly, a question for them.

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LITLEDALE, J. :

Taking the whole summing up together, I think the question was properly submitted to the jury.

PARKE, J. :

The direction was substantially, though not critically, correct. Taking the whole together, it was impossible for men of common sense to understand that they had to consider any other question than one, viz. whether the tendency of the libel was injurious to the plaintiff.

Rule discharged.

BRETT v. BEALES AND OTHERS.

(Moody & Malkin, 416—429; 10 Barn. & Cress. 508—511.)

An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls.

In an action for tolls claimed by a Corporation, an ancient schedule produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, and by the lessee to the collectors, by which they have actually collected, is admissible in evidence for the Corporation.

Contrā, when the copies in the hands of the lessee are not shewn to have been delivered to him from the Corporation, although they correspond accurately with the old schedule.

An Act of Parliament, private in its nature, is not made admissible in evidence against strangers by a clause declaring "that it shall be deemed and taken to be a public Act, and shall be judicially taken notice of without being specially pleaded."†

It is not a sufficient consideration for a toll thorough claimed for

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Westminster.
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† As to the mode of proof of the Act, this case is not to be regarded as an authority. See *Beaumont v. Mountain* (1834) 10 Bing. 404; *Woodward v. Cotton* (1834) 1 Cr. M. & R. 44. And see the Interpretation Act,

1889 (52 & 53 Vict. c. 63), s. 9. This observation does not detract from the authority of the case as to whether the Act is evidence, between strangers, of a recited fact.—R. C.

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passing on all roads within a town, that the party claiming it has repaired one road, a wharf, and a bridge. Where the King, before the time of legal memory, was entitled to the soil of the town of C. and to toll traverse within it, and afterwards granted to the burgesses of the town. "the town of C. with all its appurtenances;" these words are sufficient to pass the toll.

ASSUMPSIT for tolls.

The plaintiff was lessee of tolls under the Corporation of Cambridge, and brought this action to recover the amount of tolls claimed to be due to that body.

The plaintiffs produced an award made in the reign of Henry VIII., and a composition-deed reciting the award, and made in pursuance of it, for regulating certain disputes between the University and town of Cambridge. By the 19th clause of the award the toll to be taken by the Corporation was fixed at a certain sum.

The Attorney-General for the defendants :

I object to the receipt of this award as evidence, unless it is shewn that it has been acted upon ; and in point of fact, no such evidence can be given ; the tolls, when any have been taken, have varied from those here prescribed. In the former trial of this case, an award between the borough of Cambridge and the borough of Lynn was rejected on the ground that it was not shewn to have been acted on.

LORD TENTERDEN, Ch. J. :

Yes, that was an award only ; there was no deed.

The Attorney-General :

[*417] The deed derives no *authority from being made in pursuance of the award ; and if not, it can be no evidence for the Corporation : it is no more than one of the private title-deeds of the party, made between him and other parties to whom we are strangers ; and by which therefore we cannot be bound.

Campbell :

The only ground on which these papers can be evidence is, that they prove reputation as to the toll. In a case on the

Oxford circuit before Dampier, J. (*R. v. Cotton*, 3 Camp. 444) on a question as to a highway, an award was offered as evidence of reputation; but the learned Judge rejected it, considering that the mere circumstance of there being an award proved it to have been made *post litem motam*.

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Taunton, for the plaintiff:

Certainly the defendants do not in any way claim under the University; but on a question of public right like this, that is immaterial. The record of a judgment in a suit between the Corporation and an individual resisting the payment of toll would be evidence in this cause, though the defendants were strangers to that individual. In the same manner here, though the award is not the record of a public Court, yet it is a decision between the University and the town on a public matter, and therefore evidence of reputation. It is not affected by any question as to the *lis mota*. The present litigation had not commenced; or if *lis* is to be understood in the more general sense of a dispute, there was then no dispute on this subject. The University did not deny *the general right to toll, but only excepted to the manner and amount of the levy.

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Patteson:

The common evidence is that toll was demanded and submitted to: this solemn submission by deed is surely much stronger.

LORD TENTERDEN, Ch. J.:

The deed recites the award, so that the plaintiff will have the full benefit of the award by reading the deed only. I agree that the deed derives no additional authority from being made in pursuance of the award: but I think that I ought to receive the deed on its own account. In this case reputation is admissible evidence; and certainly a solemn deed, under the seals of the University and the Corporation, relating to the tolls in question, is admissible evidence of reputation respecting them. The objection that the deed does not appear to have been exactly followed in practice, applies rather to the effect than to the admissibility.

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The deed was then read.

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An award between the Corporations of Cambridge and Northampton was afterwards put in, made in 11 Hen. VIII., whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment of 10s. by the Corporation of Northampton to the Corporation of Cambridge. *Taunton* had undertaken to give evidence of the payment of this composition of 10s.; but on the production of the Corporation books, in which it had been supposed that the treasurer of the Corporation *had charged himself with the receipt of the money, it appeared that he had only returned it as in arrear, and the evidence of the award was struck out.

Tabrum, a clerk in the town-clerk's office in 1814, proved that he had made several copies from an old table of tolls in the handwriting of the reign of George I., which he found in the town-clerk's office, and which was indorsed "Table of tolls at Cambridge" in the handwriting of the town-clerk who had been so for some years in 1814. These copies were afterwards in the possession of the persons employed by *Edwards*, the lessee of the tolls, to collect the tolls; and these persons said that they received the copies from *Edwards*, and collected according to them.

Taunton, for the plaintiff:

I now propose to read the original table. On the former trial (*Brett v. Fisher*, sittings after Michaelmas Term, 1827,) the same evidence was given, with the exception of *Tabrum's* testimony. Then the evidence was rejected because the plaintiff had not shewn the papers by which the collectors made their collections to be copies of the table, or delivered to them as such. The evidence was only that they had since been compared with it and found to correspond.

The *Attorney-General* for the defendants:

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I do not object to the receipt of the copies as a convenient mode of shewing how the collections were *made; but the object is to put in the original document as an ancient writing carrying

back the recent scale to the age of George I. For this purpose it is not admissible. The table is only seen in the town-clerk's office; that is not the place for keeping the muniments of the Corporation; it ought therefore to be proved that the clerk had it from the Corporation muniment room. But even if it came thence, a document in the possession of the Corporation is no evidence for them, unless acted on; so that the whole evidence is that of the actual collection; to prove the mode of which, I do not object to reading the copies.

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Alderson :

On the former trial, when the evidence was rejected, the proof was in substance exactly the same. The papers by which the collection was made were then shewn to be copies of the others by actual comparison: it carries the case no farther than the person who made the copy is produced. It makes no difference whatever in the principle.

Taunton, in reply :

The deficiency in the former case was, that no evidence was given that the copies were received from the Corporation for the purpose of collecting. That is now supplied. On the former evidence, Edwards might have made out the scale from other information; and its correspondence with the old table might have been merely fortuitous.

LORD TENTERDEN, Ch. J. :

The difference between *this and the former case is, that the proof then only was that the collectors received the papers from Edwards, and that on being recently compared with the parchments they were found to correspond. There was no proof how they came to Edwards. Now it appears that they were made in the town-clerk's office by direction of the town-clerk, and that they passed thence to Edwards. I think on that state of facts I ought to receive the evidence. It will stand thus: in 1814 this original parchment, which is of ancient date, was in the town-clerk's office; it was copied there, and the copies delivered to the lessee of the tolls, who delivers them to his collectors, and they

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collect by it. I think this evidence receivable. What its effect may be is another question. I have a note of the objection.

For the plaintiffs it was proposed to read from a copy printed by the King's printer, an Act of the 52 Geo. III. c. 141. The Act is entitled "An Act for making and maintaining a navigable canal with aqueducts feeders and reservoirs, from the Stort Navigation at or near Bishop's Stortford in the county of Hertford, to join the river Cam near Clay-hithe Sluice in the county of Cambridge, with a navigable branch or cut from the said canal at Sawston to Whaddon in the county of Cambridge."

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It was proposed to read the 58th section, which recites that the Corporation of Cambridge are *entitled to divers tolls, and that those tolls might probably be diminished by the establishment of this navigation; and then provides for the letting those tolls by auction, and that if the rent be less than 400*l.* per annum, the Canal Company is to make up the deficiency.

By the 122nd section, the Company were empowered "to ask demand take and recover, to and for their own proper use and behoof, for the tonnage of all goods wares and merchandise and other matters and things whatsoever, which shall be carried or conveyed upon the said canal and cut, a rate or sum not exceeding three pence per ton per mile, all which rates shall be paid to such person or persons, at such place or places, in such manner, and under such regulations, as the directors of the said company shall from time to time direct or appoint," with power to recover the same by action or distress. "And the said directors of the said company shall have full power from time to time to lower or reduce all or any of the rates hereby granted, and again to raise the same to such sums as they shall think proper, not exceeding the sums herein mentioned, as often as it shall be deemed necessary for the interests of the said navigation."

By the 166th section it was enacted, "that this Act should be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all Judges, justices and others, without being specially pleaded."

The contemplated canal was never made.

The *Attorney-General* for the defendants objected to the receipt of this evidence :

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The 166th section is a clause introduced in a large class of these Acts, and it is therefore important to come to a correct decision in this case. The only operation of that clause is to prevent the necessity, in any legal proceedings in which the Act comes in question, of setting it out in the same manner as a private deed upon the record : it goes no farther : it is merely to facilitate those proceedings, and does not alter the character of the Act as public or private, which depends merely on its object and provisions. Now what is the nature of this Act ? a mere private arrangement, never even acted on, between the projectors of the canal and the proprietors of the contemplated line, the Corporation of Cambridge among others. These private Acts have always been treated as mere contracts between individuals ; and their recitals are of no more value than the recitals of any private deed. They in no way bind the inhabitants of the town or strangers : the most that they amount to is a bargain between the adventurers and Corporation.

Campbell :

The bill not being a public Act can only be proved, even if it has any operation on this question, by an examined copy of the Act from the Parliament roll.

Taunton, for the plaintiff :

The Legislature call it a public Act by s. 166 : and if a public Act at all, it is so to all intents and purposes ; and among others for the mode of proof.

But besides this, the Act is in itself of a public *nature. Any Act which affects all the King's subjects is so ; and this Act by s. 122 gives to the Canal Company the high prerogative of taxing all the King's subjects. Such an Act as this has never been treated as a mere private contract ; though those words may have been applied to some local Acts. Being then a public Act, both in its nature and by the express declaration of Parliament, I use it, not merely for its recitals in the preamble of the section,

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but as a legislative recognition of the existence of those tolls, for the diminution of which a remedy is provided.

Storks, Serjt. :

If the Act is brought forward by legal evidence, the Court must notice it whether a public or a private Act : the distinction between them is as to the mode of authentication, not to the effect when authenticated. The recitals in the preamble are evidence of the facts contained in them : *R. v. Sutton*, 4 M. & S. 582.

Campbell :

R. v. Sutton proceeded expressly on the ground that it was a public Act.

The Attorney-General in reply :

The argument for the plaintiff applies equally well to any private estate bill, and to all rights of individuals. For instance, in the present Act there are clauses protecting certain lands stated to belong to Lord Braybrooke, and other proprietors on the line of the canal, from interference. If *Mr. Taunton's* argument were correct, this would be a legal recognition of their title, and enable them, without *other evidence, to recover against any body in trespass or ejectment. So there is a clause, s. 57, stating the Corporation to be alone entitled to erect cranes or landing and weighing machines in Cambridge, and to receive payments for the use of them. Surely this could not be treated as evidence of that right. It is obvious that it is the mere agreement of certain parties, as to what shall, between them, be considered as their rights respectively : and in point of fact, if a bill of this kind is unopposed, and conforms with the rules of Parliament, it passes as a matter of course, without enquiry.

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LORD TENTERDEN, Ch. J. :

The point is quite new, and of great importance, as it will apply to so large a class of statutes. I will therefore consult my learned brothers on it to-morrow morning, as the cause will not finish to-night, and they will then be here.

On the morning of the 17th his Lordship did so, and on returning into Court said: Two grounds have been laid for the admission of this evidence: the one, that the concluding clause renders it admissible as a public Act: the other, that even independently of that clause, it is so from its nature. The answer given to the first was that the clause only applied to the forms of pleading, and did not vary the general nature and operation of the Act. I was inclined to that opinion at the time, and my learned brothers agree with me in that impression. We also think that the second ground fails. It is said that the bill gives a power of levying a toll on *all the King's subjects, and therefore the Act is public: the power given is not so extensive, it is only to levy toll on such as shall think fit to use the navigation. The ground therefore on which it is said the Act is public, and the evidence admissible, fails; and I cannot receive it.

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The evidence was accordingly rejected.

No repairs were proved to be done to any roads by the Corporation, with one exception, although they had repaired a bridge and a wharf; and the toll appeared to be taken indiscriminately at all entrances to the town.

To prove the antiquity of the toll, an extract from Domesday Book was produced, whereby it appeared that at that time the town of Cambridge belonged to the King, who received from it certain "consuetudines." There was much discussion on the meaning of the word "consuetudines," the plaintiff contending that it meant tolls, the defendants customary rents: but nothing material was decided on its interpretation.

Two extracts from the Pipe Rolls of 31 Hen. II. and 1 John were also read, shewing that at those times the burgesses of Cambridge had had their town to farm of the Crown, in consideration of a payment, in one instance of 300 marks, in the other of 250. The town thus continuing in the hands of the Crown, King John, in the 8th year of his reign, granted a charter, of part of which the following is a translation:

"We have granted and by this our charter confirmed to our burgesses of Cambridge the town of Cambridge with all its appurtenances, to have and to hold for ever of us and our heirs

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to them and their heirs," rendering therefore 60*l.* for all services, "wherefore we will and firmly enjoin that the aforesaid burgesses and their heirs shall have and hold the before mentioned town, with all its appurtenances, well and peaceably," &c.

LORD TENTERDEN, Ch. J., in summing up to the jury said :

There are two sorts of toll recognised by the law, toll traverse, and toll thorough ; and the plaintiff will be entitled to a verdict on the pleadings in this case, if he establishes his title to either. Where a party has the burden of repairing public highways, he may, though those were public ways at the time that the liability to repair commenced, be entitled to take toll in consideration of those repairs ; and that is toll thorough. The public however having an antecedent right to the use of the ways, he can only be so entitled by virtue of such consideration ; and for that purpose the plaintiff in this case attempted to prove that the corporation of Cambridge repaired the roads and streets there. He has only proved that they repaired a single road : and having failed to prove that they repair all the roads and streets in Cambridge, where they claim the toll, the consideration fails, and they cannot be entitled to toll thorough.†

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They may however be entitled to toll traverse. *That arises, when the owner of the soil dedicates it to the use of the public ; but, at the time of the dedication, reserves to himself toll from those who pass over it. The reservation must be made at the time ; and in this case therefore it must have been made before the time of William the Conqueror, for it appears from Domesday Book that there was then a town, and highways of some standing at Cambridge. At that time the town belonged to the King, and if he or his predecessor, at the time when highways were first made there, reserved toll to themselves for passing over them, he would at that time be entitled to toll traverse. Of that you must judge from the expressions in Domesday Book, and from the evidence of later usage, to which you may presume a rightful beginning, if any such can by law be devised. If at that time the King was entitled, not only to the soil of the town, of which there is no doubt, but also to toll traverse within it, I am of opinion

† S. P. *Truman v. Walgham*, 2 Wils. 296.

that that right to toll would pass to the burgesses, by the grant of the town with its appurtenances in the charter of King John, without any more express words relating to it.†

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Verdict for the defendants.

In Hilary Term *Taunton* moved for a new trial on the ground that certain entries in the Corporation books with respect to the tolls, such as orders made for granting leases of them, the appointment of committees to manage them, &c., which had been rejected at the trial, ought to have been received as evidence that the Corporation then dealt with tolls; and he urged that there was a distinction between the books of a corporation, to which all members of the corporation, and even an inhabitant who was the relator in a *quo warranto*, though not a member of the corporation, had access. He also moved on the ground of a misdirection by Lord TENTERDEN, in telling the jury that the repairs proved were not a sufficient consideration for the toll claimed, treating it as toll thorough. On the first point, the Court immediately refused the rule, referring to Phill. Ev., and denying the existence of any distinction, in case merely affecting the private property of a corporation, between the books of a corporation and of an individual. On the latter point, they took time to consider whether they should grant a rule or not; and finally the

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Rule was refused.

[The judgment finally delivered on the last-mentioned point was as follows:]

LORD TENTERDEN, Ch. J.: †

1830.

At the trial of this case, I considered that the law was correctly

[10 Barn. &
Cress. 510]

† The *Attorney-General* in his address to the jury, in commenting on the leases of tolls produced, had treated them as void for want of specifying the amount of the tolls, and had stated that MONTAGUE, J., in the case of *Maidenhead* in Berks, Palmer, 86, had considered that a grant of tolls by the Crown was void for the same omission.

by Chief Baron COMYNS in his Digest, Toll. E.

[And it is settled by the judgment of the Exchequer Chamber in *Stamford v. Paulet* (1 Cr. & J. 400), that it is sufficient if the toll be reasonable, without any specific amount being fixed.—R. C.]

In that case however the three other Judges were of a contrary opinion: and their opinion is adopted

† This judgment is cited by WILLES, J. in *Brecon Markets Co. v. Neath and Brecon Ry. Co.* (1872) L. R. 7 C. P. 555, 566, 41 L. J. C. P. 257, 262 (affirmed L. R. 8 C. P. 157).—R. C.

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laid down in *Truman v. Walgham*,[†] and, therefore, did not present the claim to the jury as one which could be supported as toll-thorough; inasmuch as the corporation of Cambridge claimed the toll over the whole town, although the repairs were done in some places only. I still continue of the same opinion; and the decision in *Truman v. Walgham* is confirmed by *Hill v. Smith*. That was a claim of toll by the corporation of the city of Worcester; they repaired certain streets in the city, but not all; and if repairing some of the streets had been a sufficient consideration, they would have established a right to the toll as toll-thorough. But MANSFIELD, Ch. J. says, "If claimed as toll-thorough it cannot be supported; for it is not alleged that the corn passed over any street which was repaired by the corporation." In the present case, reliance was placed on that which is reported in Cro. Eliz. § to have been said by POPHAM, J. in *Cook v. Shepherd*, "One may have toll-traverse by prescription, and so he may have toll-thorough; but it ought to be for some reasonable cause which must be shewn, viz. that he is to maintain a causeway, or to repair a way, or a bridge, or such like;" and it was observed, that he does not state it to be necessary that the repair should be in the particular way in respect of which the toll is *claimed. But the same case is reported in Moore;[‡] and by that report it appears to have been held, that a man may have toll-thorough in the King's highway, if he is bound to repair the way or causeway, &c. It is also laid down in 2 Roll. Abr. 172, Pre-rogative, E. pl. 20, that "the King cannot charge his subjects by an imposition, unless it be for the benefit of the subjects charged, and where they have a *quid pro quo*." Now it cannot be for the benefit of a person passing along a street in Cambridge that the corporation are bound to repair some other street; such repair cannot, therefore, be a sufficient consideration to support a claim to toll-thorough. For these reasons we are of opinion that there was not any misdirection, and that a rule for a new trial should not be granted.

Rule refused.

[†] 2 Wils. 296.

§ 710.

[‡] 10 R. R. 357 (10 East, 476; 4 Taunt. 520).

|| P. 574.

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10 Barn. & Cress. 527—541; S. C. 5 Man. & Ry. 418; 8 L. J. K. B. 210;
Lloyd & Welsby, 132.)

1890.
Feb. 12.

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A merchant resident at Sydney shipped goods for England on board the ship *C.*, and by another ship, that sailed after her, wrote to an agent in England, and desired him, if he received that letter before the *C.* arrived, to wait for thirty days, in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days, employed a broker to effect an insurance, and handed the letter to him. The broker told the underwriters when the *C.* sailed, and when the letter ordering the insurance was written, but he did not state when it was received, nor the order to wait thirty days after the receipt of it, before the insurance was effected. The *C.* never arrived. In an action on the policy, no fraud was imputed to the plaintiff; but several underwriters were called for the defendant, who stated, that in their opinion the matters not communicated were material; and the jury being of opinion that a material part of the letter had been concealed, found a verdict for the defendant: Held, that the evidence of the underwriters' opinion was properly received,† and that even without it the jury would have been bound to find that the part of the letter not communicated to the underwriters was material, and that, consequently, the policy was void.

COVENANT on a policy of insurance on goods by the ship *Cumberland*, at and from Sydney to London, effected by the plaintiff as agent for one Robert Campbell, and for his use and benefit, with the Indemnity Mutual Insurance Company, of which the two defendants were directors. The claim was for a total loss by perils of the seas. Plea, first, *non est factum*. Upon the second, third, and fourth pleas no question arose. The defendants pleaded, fifthly, that before the time of the making and executing of the policy of insurance, to wit, on the 28th day of May, in the year of our Lord, 1827, to wit, at London, the said Robert Campbell sent from Sydney to one Harris at London a letter containing the order for effecting the said policy by a certain other ship called the *Australia*, which had set sail and departed from Sydney a long time, to wit, more than a month after the

† In the subsequent case of *Campbell v. Rickards* (1833) 5 B. & Ad. 840, which was an action of negligence by the merchants against the brokers arising out of the same transactions, it was held that evidence of the opinion of underwriters as to

the materiality was not admissible. This does not affect the present decision, in so far as the Court considered the facts not disclosed to be material, independently of the opinion of underwriters.—R. C.

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said ship called the *Cumberland* had set sail therefrom on her voyage in the policy mentioned; and that he, the said Robert Campbell, then and there instructed the *said Harris to deliver the said letter to one William Emmett, who had before then sailed from Sydney to London, on board the said ship called the *Cumberland*, on the said voyage, in case he the said William Emmett should have arrived in England when the said Harris should receive the said letter; but if the said William Emmett should not have then arrived, the said Robert Campbell then and there instructed the said Harris to retain the said letter in his possession for the space of thirty days from the time when he should receive it, and at the expiration of that time to deliver the same to the plaintiff, and certain other persons using the style and firm of Messrs. Rickards, M'Intosh, & Co., he, the said Robert Campbell, having then and there, in the said letter, intimated that he had directed the said Harris not to deliver the said letter to the said persons using the said style and firm of Messrs. Rickards, M'Intosh, & Co., until the expiration of thirty days after the arrival of the said ship called the *Australia*, in London aforesaid, in order to give every chance for the said William Emmett's arrival in England before the said letter containing the said order should be delivered to the said Messrs. Rickards, M'Intosh, & Co. (he, the said Robert Campbell, thereby meaning that unless he, the said William Emmett, did arrive in England before the expiration of the said space of thirty days after the arrival of the said ship *Australia* in London, he, the said Robert Campbell, had little hope that the said ship called the *Cumberland* would arrive in safety with the said William Emmett on board thereof at London aforesaid.) That the said letter was dated at Sydney on the 28th May, 1827, and that it stated that the said vessel, called the *Cumberland*, sailed on the said voyage on the 25th day of April, in the year of our Lord 1827. That

[*529] *before the making and executing of the said policy, to wit, on the 8th day of October, in the year of our Lord 1827, the said ship *Australia* did arrive from Sydney at London with the said letter; and that the said Harris did receive and detain the said letter so consigned to him as aforesaid, in his possession for thirty days and more after the receipt of the said letter; and at the

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expiration of that time, to wit, at London aforesaid, did deliver the same to the plaintiff, who, thereupon, then and there caused the said policy to be made and executed as in the declaration mentioned. That the plaintiff did not disclose, nor was it disclosed to the defendants or the said company, before or at the time of making and executing the policy, that the said letter came by the ship *Australia*, or that the *Australia* had sailed from Sydney so long after the *Cumberland*, or after the *Cumberland*, or that the said Robert Campbell had so requested the said letter containing the said order, to be so detained by the said Harris as aforesaid, or that the same had been so detained by him as aforesaid, or that the said Robert Campbell had so intimated in his said letter, the purpose for which he so directed the said letter to be so detained by the said Harris as aforesaid, or that the said Robert Campbell had so intimated that he had little hope of the safe arrival of the *Cumberland* at London with the said William Emmett on board thereof, in case she did not arrive within the said space of thirty days after the arrival there of the *Australia* as aforesaid. That the said several matters and things so concealed as above mentioned from the defendants and the said company at the time of making and executing the said policy, and not disclosed as aforesaid, materially affected and increased the risks, touching which, the capital, stock, and funds of the said company, *were by the said policy, intended to be made liable, and were thereby made liable as aforesaid; and which matters and things, if the same had been disclosed, would have materially affected and increased the premium or consideration for the said insurance, to wit, at London aforesaid, and this the defendants are ready to verify, &c. Sixth plea, the same in substance. Seventh, that the plaintiff, before, and until, and at the time of making and executing the policy in the declaration mentioned, concealed from the defendants and the said company divers facts and matters, which, at the time of making and executing the said policy, materially affected and increased the risks, touching which, the capital, stock, and funds of the said company, were intended to be made liable, and were thereby made liable as aforesaid; and which facts and matters, if disclosed, would have materially affected and increased the premium or consideration for the said

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insurance. Replication, that the defendants at the time when, &c. of their own wrong, and without the causes by them in their said fifth and sixth pleas in that behalf alleged, committed the breach of covenant in the declaration mentioned. To the seventh plea, that the plaintiff did not, before, or until, or at the time of the making and executing the said policy, conceal from the defendants and the said company any facts or matters which, at the time of the making and executing the said policy, materially affected or increased the said risks in the said seventh plea mentioned and referred to; or which, if disclosed, would have materially affected the premium or consideration for the said insurance. Issue thereon. At the trial before Lord Tenterden, Ch. J., at the Guildhall sittings after Hilary Term, 1829, the following were admitted to be the facts of the case: Mr. Robert Campbell was the party interested in *the policy in question, and had been for some years an occasional correspondent of the house of Rickards, M'Intosh, & Co. In April, 1827, the goods insured by the policy in question, consisting of 4,175 fur seal skins, were shipped by Campbell on board the *Cumberland*. Mr. William Emmett was going as passenger on board the *Cumberland*, and the skins in question were put under his care. The ship sailed with the skins and Emmett on board from Sydney, on the 25th of April, 1827, and went from Sydney to Hobart Town, Van Diemen's Land; and after the assured, R. Campbell, received intelligence from Van Diemen's Land, of the ship's being there, he wrote the letter of orders, upon which the policy in question was effected. The following is a copy of the letter from Mr. Campbell ordering the insurance:

“SYDNEY, NEW SOUTH WALES,

“28th May, 1827.

“In case of the non-arrival of Mr. W. Emmett per ship *Cumberland*, you will herewith receive the seconds of ten sets of Treasury bills, amounting to 3,000*l.*, and the second of exchange, Elizabeth Von Bibra on Henry Powell, for 80*l.*, making 3,080*l.* sterling; which amount I will thank you to invest agreeable to the accompanying indent.

“[I will also thank you to effect insurance, at market price, on forty-nine casks, containing 4,175 New Zealand fur seal skins,

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shipped to the consignment of Mr. W. Emmett per *Cumberland*, or, in case of death, to your house; for which purpose I enclose you the bill of lading. The *Cumberland* left Port Jackson for London, *via* Hobart Town, on the 25th April, 1827, and by letters received from Mr. Emmett was at Hobart Town *on the 10th May, 1827, and was expected to sail from thence in ten or fourteen days from that date.] Insurance to be effected on the goods shipped to my consignment, and the freight payable at New South Wales. I wish the goods to be shipped by two or three opportunities, and, if practicable, by vessels coming direct to Sydney. To give every chance to Mr. Emmett's arrival in England, I have directed my friend Mr. Harris not to deliver this until thirty days after the arrival of the *Australia* in London; and should Mr. Emmett arrive after you have fulfilled these instructions, you will communicate to him what you have done, it having been mutually agreed upon, previous to his leaving New South Wales, that in case of any accident to him you should be appointed agent of this concern. In confirmation of which, I annex a copy of my letter to you per *Cumberland*."

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The foregoing letter was in a cover, on which were written the following words: "This letter is to be delivered by Mr. Harris to Mr. Emmett, if he has arrived, and if not, to be retained in Mr. Harris's possession thirty days from the date he receives it, and then to be delivered to Messrs. Rickards, M'Intosh, & Co., London."

The *Australia* arrived in London on the 5th of October, 1827, and on the 8th of October, 1827, the letter was delivered to Mr. Harris, who resided in London.

Mr. Harris retained the letter for thirty-six days, that is to say, until the 13th November following; and no news having up to that time been received by him of the ship *Cumberland*, or of Mr. Emmett, who was coming on board of her, he (Harris) then delivered the letter to Messrs. Rickards, M'Intosh, & Co.

On the 13th November, 1827, the same day on which they received the letter, Messrs. Rickards, M'Intosh, & Co. handed the letter to Towers, with directions to get effected the insurance thereby ordered. Towers went to Lloyd's, and asked several

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gentlemen the premium required for the insurance. He was asked 70s. per cent. He then went to the Indemnity Insurance Company. Mr. Ellis is the gentleman who manages all the insurance business of the office, and Towers read to him the passage within brackets of the letter before set out. Towers also stated the date of the letter, and the place from whence it was written, but did not read any other part of it than that before mentioned. Ellis asked no further questions, but demanded a premium of 60s. per cent., to which Towers agreed, and the policy was accordingly effected. The *Cumberland* was never afterwards heard of. On the cross-examination of the plaintiff's witnesses, it appeared that two other vessels that sailed after the *Australia* from Sydney had arrived in England a day or two before the policy was effected. For the defendants it was contended, that the plaintiff ought to have communicated the whole of the letter, so that the defendants might know by what conveyance it came, and how long it had been in England; and they called several underwriters, who deposed that in their opinion the whole of the letter ought to have been communicated, and that the part omitted was material. This evidence was objected to by the counsel for the plaintiff, but admitted by Lord TENTERDEN, who left the question of materiality to the jury, and they found for the defendants. The witnesses for the defendants stated, on cross-examination, that if an underwriter refuses a risk, that circumstance is never stated by the broker to those to whom the risk is afterwards *offered. In Easter Term, 1829, a rule *nisi* for a new trial was obtained, on the ground that the evidence of the opinion of the underwriters ought not to have been admitted, and that the part of the letter not read relating only to the fears of the owner, and not to any matter of fact, could not be deemed material; for that the assured were not bound to communicate any thing but facts, unless questioned upon the subject by the underwriters.

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Pollock and *Tomlinson* shewed cause :

The evidence given in this case on behalf of the defendants was properly admitted to shew that the matter withheld from the underwriters was material. It was decided in *Lindenau v.*

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Desborough,† that the question of materiality is not a matter of law, but a question of fact to be decided by a jury, and the proper evidence to guide their judgment is the opinion of persons conversant with the subject-matter of the enquiry: *Berthon v. Loughman*.‡ In *Durrell v. Bederley*,§ the evidence of underwriters was admitted with hesitation; but the question there asked was not, whether the matter in dispute was material? but whether they, the witnesses, would have accepted the risk? Then have the jury rightly found that the letter was material; for if so, it undoubtedly ought to have been communicated. The cases of *Haywood v. Rodgers*|| and *Freeland v. Glover*,¶ which were cited when this rule was obtained, are very different. In the former it was held, that a letter stating that the ship to be insured had been surveyed on account of her bad character need not be communicated; *but the reason assigned for the decision was, that the ship-owner always impliedly warrants his ship seaworthy. In *Freeland v. Glover*, the ship-owner had received two letters as to the state of his ship and crew. The second only was communicated to the underwriters, but it referred distinctly to the former letter; and the Court on that ground held, that as the underwriter knew the assured had received such other information, he was bound to ask for it if he wished to have any further communication. Here the underwriter had not any means of knowing that the plaintiff had any information respecting the *Cumberland*, except that which he read. The plaintiff knew that Mr. Campbell had continued his own insurer for thirty days after the letter arrived, that ought to have been told without enquiry; for the underwriter had no reason to suppose that he was in possession of any information on the subject. The plaintiff also knew that neither of the two ships which arrived shortly before the insurance was effected had brought the letter; the defendants could not know that, and ought to have been informed that it had been brought by a ship which sailed after the *Cumberland*, and arrived thirty days before the insurance was effected. In *Kirby v. Smith*,†† a ship had sailed from Elsinore

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† 8 B. & C. 586.

289).

‡ 2 Stark. N. P. 258.

¶ 9 R. R. 803 (6 Esp. 14; 7 East,

§ 17 R. R. 639 (Holt, N. P. 283).

457; 3 Smith, 424).

|| 7 R. R. 638 (4 East, 590; 1 Smith,

†† 19 R. R. 412 (1 B. & Ald. 672).

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on her voyage home six hours before the owner, who followed in another vessel on the same day, met with rough weather, and having arrived first, caused an insurance to be effected on his own ship; and the Court held that these circumstances should have been communicated, and that it was not sufficient to tell the underwriters that the vessel was safe on the day of her sailing. Again, in *Willes v. Glover*,† the *plaintiff, as agent, received from a foreign port the following letter, dated 30th November: "I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make the insurance as low as you possibly can for my account." On the day following the receipt of the letter the agent effected an insurance, but did not communicate the letter, and the Court held that the concealment was material. So also, in *M'Andrew v. Bell*; the plaintiff on the 24th of November received a letter from Lisbon dated the 8th, informing him that the ship was then ready to sail. The plaintiff did not insure until the 2nd of December, and after the arrival of another ship which sailed at the same time, and he did not communicate to the underwriter the letter that he had received. Lord KENYON, Ch. J. held that the concealment was material; and he observed, that "it appeared that the plaintiff did not intend to insure until he believed her to be a missing ship, as he did not effect the policy for ten days after the letter arrived, and not until another ship which had sailed at the same time with his own had arrived in safety." There is no substantial difference between that case and the present. It is plain that Mr. Campbell did not intend to have this insurance effected until, in his opinion, all reasonable expectation of the safe arrival of his ship was at an end.

The Attorney-General, Campbell, and Maule, *contrà* :

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The broker when this policy was underwritten communicated to the underwriters all that was necessary. It is not pretended that there was any fraud or misrepresentation; nor that any question was put by the *underwriter, and not truly answered. It is not even contended that the *Cumberland* was then a missing

† 8 R. R. 739 (1 Bos. & P., N. R. 14).

‡ 1 Esp. 373.

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ship, but that the owner thought her so, and ought to have made his opinion known to the underwriters. Now the underwriter is always presumed to be acquainted with the nature of the voyage for which he insures; and it is material that he should know the time when a vessel sailed, or was expected to sail, and any thing respecting the condition of the ship that varies the nature of the risk. All this, if known, must be communicated; but if the underwriter wishes for any further information to assist his judgment, he must ask for it; and any question that he proposes must be truly answered. The distinction between such matters as the assured are bound to state, and those respecting which the underwriter must enquire, if he wishes for information, is distinctly and strongly stated by Lord ELLENBOROUGH in *Haywood v. Rodgers*.† The matter relied on here as a material concealment was the mere private opinion of an individual, who had not any better means of forming a judgment than the defendants. Besides, his opinion could not in any way vary the risk, which would of course not be greater on account of his fancying that his ship was in peril. It seems to be admitted that if the letter had not arrived until the day before the insurance was effected, it would not have been necessary to mention it. But the probability of the safety of the *Cumberland* would not have been increased by the circumstance of another vessel having made a slow passage; the material fact upon which the calculation of the underwriter was to be made was the date of the ship's *departure; and that was truly stated to him. The question then comes to this, is a party about to insure bound to communicate all the fears which he himself entertains? Suppose the owner of this ship had been in England, and had received information of her departure from Sydney on a certain day, and having suffered her to remain uninsured for a period of thirty days, began to feel alarmed, and employed an agent to effect an insurance, stating to him the fears that he entertained, would the agent have been bound to inform the underwriter of that circumstance? and would the policy have been vitiated by the concealment of it? If so, a policy may be good or bad according to the strength or weakness of the nerves of the ship-owner, or

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† 7 R. R. 638 (4 East, 590; 1 Smith, 2:9).

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according to his habit of expressing or concealing the opinion that he entertains respecting his property. It will hardly be denied that the opinion of an experienced underwriter is at least as important as the opinion of a ship-owner; and yet the witnesses for the defendants stated that if some underwriters refuse a risk that fact is never mentioned to those to whom it is afterwards offered. In *Bell v. Bell*† the assured had received a letter from Riga, stating that the papers of all vessels arriving there were ordered to be sent to Petersburg, and that the order had produced a great sensation there, on account of the detention occasioned by it, and that the *Rising Sun* (the ship insured) must share the same fate. The broker, on effecting the insurance, mentioned the fact of the ship's papers being sent to Petersburg, but did not shew the letter; and it was contended that the policy was on that account void: *but Lord ELLENBOROUGH said, "The assured are only bound to communicate facts. The broker did communicate the fact of the ship's papers being sent to Petersburg for examination. He was not bound to communicate the sensations and apprehensions which that fact produced at Riga;" and this was afterwards confirmed by the Court of King's Bench. In *Carter v. Boehm*‡ also it was held that the opinions or fears of a party insuring need not be stated. This latter case is also a strong authority to shew that the evidence of the opinion of underwriters as to the materiality of the matter not communicated ought not to have been received. The broker who effected that insurance stated that, in his judgment, the opinion of the party insuring was material, and ought to have been communicated. But Lord MANSFIELD, in giving judgment, said, "We all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion *after* an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness." And the judgment of GIBBS, Ch. J., in *Durrell v. Bederley*, agrees with this. "I am of opinion that the evidence

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† 11 R. R. 769 (2 Camp. 475).

‡ 3 Burr. 1905.

of the underwriters, who were called to give their opinion of the materiality of the rumours, and of the effect they would have had upon the premium, is not admissible evidence. It is not a question of science, in which scientific men will mostly think alike, but a *question of opinion, liable to be governed by fancy, and in which the diversity might be endless." *Lindenau v. Desborough* is not a conflicting authority; for there the opinions given did relate to a question of science.

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Cur. adr. vult.

The judgment of the Court was now delivered by

LORD TENTERDEN, Ch. J. :

This was an action on a policy of insurance on goods by the ship *Cumberland*, at and from Sydney to London. A verdict having been found for the defendants, a rule *nisi* for a new trial was granted; and on the argument the main question was, whether a certain letter, which had been received by the plaintiff, ought to have been communicated to the underwriters. One part of it, stating the time when the *Cumberland* sailed from Sydney, and when she was expected to sail from Van Diemen's Land, was stated, but the residue was not. Now the part which was not read contained this expression: "To give every chance for Mr. Emmett's arrival in England, I have directed my friend, Mr. Harris, not to deliver this until thirty days after the arrival of the *Australia* in London." The *Australia* did arrive, the thirty days elapsed, and Mr. Emmett, who was on board the *Cumberland*, did not arrive; and in the mean time two other vessels, that sailed after the *Australia*, arrived from Sydney. And the question was, whether this part of the letter was material, as altering the risk and the premium that the assured would have to pay? At the trial several witnesses were examined, who stated that they thought the letter material; but it has been contended, that no such evidence ought to have been received. I know not how the materiality of any matter is to be ascertained *but by the evidence of persons conversant with the subject-matter of the enquiry. If such evidence is rejected, the Court and jury must decide the point according to their own judgment

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unassisted by that of others. If they are to decide, all the Court agree in thinking that the letter was material and ought to have been communicated, and that a jury would have been bound to come to that conclusion. The case is somewhat peculiar. The ship was at Van Diemen's Land. The owner, who was resident at Sydney, and who would know the character of the ship, wrote to his agent here by another vessel sailing from that place at the same time that the *Cumberland* was expected to leave Van Diemen's Land, and directed him, after the receipt of that letter, to give his ship every chance of arriving before he effected the insurance. Surely the fact of his waiting so long a time after the arrival of the letter before the insurance was effected would have influenced the mind of the underwriter in deciding upon what terms he would accept the risk. There was another fact also not immaterial,—two ships had arrived shortly before the insurance was made, and the underwriter might naturally suppose that the letter came by one of them ; he should therefore have been informed of the true time when it was received. For these reasons we are of opinion that the verdict for the defendants was right.

Rule discharged.

1830.
April 24.
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DOE D. MANN, CLERK, v. WALTERS.

(10 Barn. & Cress. 626—634 ; S. C. 5 Man. & Ry. 357 ; 8 L. J. K. B. 297.)

Seemle, that where a notice to quit is given by an agent of the landlord, the agent ought to have authority to give it at the time when it begins to operate ; and that a subsequent recognition of the authority of the agent will not make the notice good.

Assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, the bringing of an ejectment is not a sufficient recognition of such authority to entitle the lessor of the plaintiff to recover, because the recognition ought at all events to be before the day of the demise laid in the declaration.

EJECTMENT. Plea, not guilty. At the trial before Burrough, J., at the Summer Assizes for the county of Cornwall, 1829, the only question was, as to the validity of a notice to quit. It appeared that the defendant was a yearly tenant of certain glebe land to the lessor of the plaintiff, who had left England five years

before the commencement of the action, and had since resided in Italy. The notice to quit purported to be signed by one Grylls as the agent of the lessor of the plaintiff, and was delivered to the defendant's wife on the 22nd day of June, 1827, and required the defendant to quit on the 25th day of December then next following, or at the expiration of the current year of his tenancy. The declaration was entitled of Hilary Term, 1829, and the day of demise was the 1st January in that year. Grylls was called as a witness. He stated, that he was a banker as well as an attorney, and managed Mr. Mann's affairs in his absence; that he had not let the *land to the defendant, but had received rent from him; that Mr. Mann, when in England, kept the glebe land in his own hands. It was objected by the counsel for the defendant that the notice was insufficient, because it did not appear that Grylls had any authority from Mr. Mann to give it. The learned Judge thought that as Grylls managed Mr. Mann's affairs and received his rents, he had an implied authority to give the notice to quit, and directed the jury to find a verdict for the lessor of the plaintiff; but reserved liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that he had no such authority. A rule *nisi* having been obtained by *Follett* for entering a nonsuit, on the ground that a mere receiver of rent had not, as such, authority to determine the estate of a tenant from year to year by giving a notice to quit; *Doe v. Read*,† *Right v. Cuthell*,‡ and *Goodtitle v. Woodward*§ were cited, and the authority of the last-mentioned case was called in question.

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Coleridge now shewed cause :

Doe v. Read † shews that a receiver appointed by the Court of Chancery, with a general authority to let lands to tenants from year to year, has also authority to determine such tenancies by notice to quit. In *Right v. Cuthell* notice was given by two executors out of three, on behalf of themselves and the third : it was given under a proviso in the lease which required it to be in writing under their respective hands. This was a proviso to

† 12 East, 57.

Smith, 83).

‡ 7 R. R. 752 (5 East, 491; 2 § 3 B. & Ald. 689.

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defeat a larger estate, and required to be literally complied with; if the evidence of authority had been ever so complete, this defect would *not have been mended. Secondly, supposing that difficulty out of the way, it seems to have been conceded that if the act of determining the lease were manifestly or necessarily a benefit to the third joint-tenant, then as the act of the two would have bound him, the notice would have been good, so that it seems it was a question of evidence of authority. *Goodtitle v. Woodward* † shews, that if the notice be given by an agent, a subsequent recognition of his authority is sufficient to make the notice valid, according to the maxim, *omnis ratihabitio retrotrahitur et mandato æquiparatur*. If that case be law, this rule must be discharged; for the present case, assuming the objection to be grounded in fact, is within it, and is not within *Right v. Cuthell*. It is good law, without having recourse to the maxim of ratification, upon the distinction between the two cases; in the one, the act professed to be done by the principals, and was defective on its face; in the other, the act professed to be done by an agent, and was on its face sufficient. Wherever an act is done by an agent, it is done in some measure at the peril of the party towards whom it is done. If he doubts the authority, he should make enquiry. In the case of sales to, or purchases made from agents, the seller or the buyer must prove the agency. So, if one act on a licence given to him by an agent. There is not, therefore, the inconvenience suggested by LAWRENCE, J., in *Right v. Cuthell*, where the notice is regular on the face of it, and purports to be from a sufficient agent. If the tenant acquiesces in the authority at the time, he must act upon it then as valid. In fact, this is done in numberless cases, where notices are

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*given by attorneys, stewards, and agents. All the reasoning in *Right v. Cuthell* against the effect of subsequent ratification goes upon this: if the notice upon the face of it discloses a defect contingent upon ratification, the party is left in doubt; whereas if the notice be perfect on the face of it, the party has the same assurance, whether it purports to be signed by an agent, or by the party himself and served by an agent. This is evidently what Lord TENTERDEN meant in *Goodtitle v. Woodward*, † though

† 3 B. & Ald. 689.

it is very shortly expressed in the report. But, secondly, the ratification is evidence of the previous authority, just as it may be inferred from previous acts acquiesced in by the principal. Agents commonly act under authority conceived in very general terms; the principal's acts, either before or after the authority given, must limit it. In this way, nothing can be stronger than bringing the action; it shews not only subsequent adoption, but a previous authority. In *Roe v. Pierce*,† the steward of a corporation gave a verbal notice to quit; it was objected, that the notice should have been under the common seal, or that the agent should have been authorized by letter of attorney under seal; but it was ruled, that by bringing the ejectment, the corporation shewed that they authorized the act.

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(PARKE, J.: The notice ought to be such as the tenant could act upon with security at the time when it was given. What assurance had the tenant that the landlord would accept possession at the end of the half year?

LITLEDALE, J.: The agent ought, at the time when he gave the notice, to have had authority to determine the estate of the tenant; for the notice is valid only by reason of its being the notice of the landlord. *If the landlord, therefore, gave authority to the agent after the six months mentioned in the notice began to run, the tenant would not have six months' notice.)

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It is not necessary that the validity of the notice must be demonstrated at the time of the service. It is sufficient if the notice be so framed as to convey a reasonable assurance, that the party may safely act on it. If it were necessary that the validity of the notice should be demonstrated at the time it is given, the consequences would be very inconvenient; because, as no man can be bound to act on an insufficient notice, nor lose any thing by declining so to do, a tenant would not be bound to quit where the notice was by an agent, not proved to be such at the time, even although that agent was fully authorized. Or suppose the notice to have been signed by the lessor of the plaintiff, and

† 11 R. R. 673 (2 Camp. 96).

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served by some person who could not prove his handwriting, and knew nothing of his having desired it to be sent, could the tenant defend himself by saying, that neither he nor the person serving the notice, knew the handwriting, and, therefore, he was not assured that he could act safely upon it at the time he received it. The same principle applies to distresses made by bailiffs, demands in trover, and demands of possession to make a man a trespasser. Wherever a man acts by an agent, the person on whom he acts disputes or acquiesces in the authority at his peril. If he disputes it, and it turns out to be valid, he is bound by it; if he acquiesces in it, and it was invalid, he is bound by it; the other party is not. There is a manifest distinction between the notice itself and the authority to serve it. Of the notice the tenant has a right to judge at the time; he must see it, or hear it. The authority he cannot compel the production or *proof of. He must enquire, if he has any doubt, and may have recourse to the principal; but he cannot go further. The same principle applies to demands in trover, distresses in replevin, and entries on lands. In all these cases the question is, was the act done by the principal at a certain time? The evidence is, that another person, a stranger, did them; but that, subsequently, the principal made them his own acts by assenting to them, adopting them, and acting upon them. No greater inconvenience results to the other party in the case of a notice to quit, than in these cases. At all events, the rule cannot be made absolute for a nonsuit, but for a new trial only; for there was some evidence to go to the jury that Grylls had authority. For the tenant received a notice, good on the face of it, which purported to be given by Grylls as agent to Mr. Mann. The tenant never repudiated that notice, for it was received without objection, and never returned. He must be taken to have assented to it.

Follett, contra, was stopped by the Court.

BAYLEY, J. :

I think that it was a question for the jury upon the evidence, whether Grylls had authority from the lessor of the plaintiff to

give the notice to quit, and that the rule therefore ought to be made absolute for a new trial, but not for a nonsuit. There was evidence that Grylls, who was a banker as well as an attorney, was the manager of the affairs of the lessor of the plaintiff, and it would be a question for the jury, whether he had authority to do the act in question? The jury, from the fact of Grylls having managed the affairs of the lessor of the plaintiff, and received the rent for him, may or may not infer that the lessor of *the plaintiff intended to authorize him to give notice to quit. The fact of such authority having been given is one peculiarly within the knowledge of the lessor of the plaintiff, and he cannot complain that he is hardly dealt with, if the jury will not, from the facts proved, draw the inference that Grylls had authority. If any express authority was given, Grylls might have proved it, but he only proved that he managed the affairs of the lessor of the plaintiff, and received rent from the defendant. There was no evidence of any express authority to give the notice, but then there was some, though slight evidence, of an implied authority. As to the subsequent recognition, the case of *Goodtitle v. Woodward*† is not in point. There the recognition was certainly before the ejectment was brought, and probably before the day of the demise in the declaration; in this case, there was no recognition of the authority of the agent before the day of the demise laid in the declaration.

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LITTLEDALE, J. :

I also think that this rule should be made absolute for a new trial. But if I had been upon the jury, and this evidence had been given, I should have thought that Grylls had no authority to give the notice. Mr. Mann, when he left this country, may have made Grylls manager of his affairs and receiver of his rents, without intending to authorize him to determine tenancies. Suppose Mann had lent money upon mortgage, would it follow that, as manager of his affairs, Grylls would have had authority to determine the loan? Clearly not. Nor does it follow, from his being manager of Mann's affairs, that he had authority to determine the estate of the tenants. As to the notice to quit, I

† 3 B. & Ald. 689.

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am of opinion that, if Grylls had not authority to give *such notice at the time when it was given, or at least when the half-year mentioned in it began to run, no subsequent recognition of his authority would make it valid. I think that the ratification of the act on the day after the notice was given, or after the half-year began to run, would not be sufficient; because, in that case, the tenant would not have six months' notice, the notice being valid only from the time when it becomes the notice of the landlord.

PARKE, J. :

The notice to quit contains an implied assertion that Grylls was the agent of Mann for the purpose of giving that notice, and it is argued that the fact of the defendant having received the notice and kept it without making any objection, was evidence, as against him, to go to the jury that Grylls had authority to give it. It was not shewn that the defendant had read the paper and assented to it; for it was delivered to the defendant's wife, and there was no evidence to shew that he had ever read it, unless that it is to be presumed from the fact of his having kept it. But even if such a presumption be made, still it would be very slight evidence that Grylls was the agent of the lessor of the plaintiff; for whether he had authority or not, was a fact not within the knowledge of the tenant. There is no distinct proof that Grylls had any express authority to manage the affairs of the lessor of the plaintiff. The evidence is that he did manage his affairs, and that he received the rent of the premises in question. But a mere receiver of rents, as such, has no authority to determine a tenancy. I think very little reliance, therefore, can be placed on the form of the notice to quit, or on the fact that Grylls received the rent.

[634] The next ground on which it is said that Grylls was authorized to give the notice is, that the lessor of the plaintiff, by bringing the ejectment, has recognized the authority of Grylls, and, therefore, according to *Goodtitle v. Woodward*,† has rendered the notice to quit valid from the time when it was given. I cannot say that I am satisfied with the reasons given for the decision in

† 3 B. & Ald. 689.

that case. But assuming that a subsequent recognition of the authority of an agent can in any case be sufficient, it ought, at all events, in this case, to have been before the day of the demise laid in the declaration, for the plaintiff must shew a right to the possession on that day. The bringing of an ejectment, therefore, is not, in this case, a sufficient recognition of the authority of the agent. In *Right v. Cuthell*,† it was held by Lord ELLENBOROUGH, Ch. J. and LAWRENCE, J., that the ratification by a joint tenant of a notice to quit given by his companion would not make it good, on the ground that the notice must be such an one on which the tenant can rely and act with certainty at the moment of receiving it. Now if Grylls had not authority to give the notice at the time when it began to operate as a notice, it seems to me that it was insufficient, and that the lessor of the plaintiff would not be entitled to recover. But inasmuch as there was some evidence, though very slight, from which the jury might infer that Grylls had a previous authority, I think that the rule should be made absolute, not for a nonsuit but for a new trial.

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Rule absolute for a new trial.

RICHARDS v. BASSETT.

(10 Barn. & Cress. 657—663; S. C. 8 L. J. K. B. 289.)

A plaintiff in trespass was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain:—the defendant, in order to shew that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said that they had considered the claim and the evidence, and presented that all the said land within the said boundaries were part and parcel of the common called K., and that neither the said A. B. nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any further or greater right than such as the other freehold tenants of the lordship had for their commonable cattle:

Held, that this instrument was not admissible in evidence either as a

† 7 R. R. 752 (5 East, 491; 2 Smith, 83).

1830.
April 27.
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presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested; nor as an award, because there was no mutual submission; nor as evidence of reputation, because it was the declaration of the homage *post litem motam*.

TRESPASS for breaking and entering the plaintiff's close, called Mynydd yr Havod Ycha, situate in the parish of Lanwonno, in the county of Glamorgan. At the trial before Clarke, Ch. J., at the Great Sessions for the county of Glamorgan, it appeared that the plaintiff was the occupier of a farm called Havod Ycha, otherwise Tyr Adam, and the defendant was the owner of an adjoining farm called Havod Genol. The two farms adjoined on a mountain called Kefngwingil, in the lordship of Miskin. The plaintiff claimed to be exclusive owner of that part of the mountain adjoining his farm, and gave evidence of acts of ownership exercised there; as turning on his sheep and cattle, and excluding those of other persons, and then proved a trespass thereon by the defendant. The defendant, among other evidence, put in an instrument, purporting to be a presentment of the 3rd of August, 1759, which was produced by the steward of Lord Bute, who was lord of the manor of Miskin, and which he found among the rolls and muniments of the manor. In 1759, Lady Windsor was lady of the manor. He then proved that all the freeholders did suit and service, and that Lanwonno was in the manor of Miskin. That instrument was in the following terms:

"Lordship of Miskin, with its members, Pentirch and Clunn: At the Court Baron of the right honourable Alice, Lady Viscountess Dowager Windsor, lady of the said lordship, on Friday the 3rd day of August, in the year of our Lord 1759, before Thomas Edwards, gent., chief steward there, and William Bruce, Esquire, and Edward Matthew, Esquire, suitors of the same Court." (The presentment then set out the names of the jurors of homage, and proceeded as follows:) "We the said jurors, who were sworn and charged to view such part of the common or waste land, called Kefngwingil, as lieth within the said lordship, as is claimed by Evan Richard, a freehold tenant of the said lordship, to belong and appertain to his tenement, called Tir Adam, situate in the parish of Lanwonno, in the said lordship, do say upon our oaths that we did, on Wednesday the

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11th day of July last, repair and go to the said common or waste lands called Kefngwingil, in the parish of Lanwonno, within the said lordship, and view certain boundaries there shewed us by the oaths of," &c. &c. (It then described the boundaries, and proceeded as follows.) "And we the said jury, on our oath do say, that we have seriously considered the claim of the said Evan Richard, and the evidences produced by him in support thereof, and we do, on our oath, present that all and every part of the said lands contained within the said boundaries are part and parcel of the common called Kefngwingil, and that neither the said Richard nor the tenants or occupiers of the said tenement, called Tyr Adam, have or hath, or ought to have, to the best of their knowledge or belief, any separate or distinct right to the same, or any other further or greater right *than such as other the freehold tenants of the said lordship can or may have or claim to the same for their commonable cattle. Also we, the jury hereunder named, do present the right of Kefngwingil to Evan Richard, to graze with his commonable cattle as usual." This presentment was objected to; but the learned Judge received it, and finally told the jury to find for the plaintiff, if they thought, upon the evidence, that he had an exclusive right to the possession of that part of the mountain called Havod Ycha; but, if they thought that he had only a right of common, to find for the defendant. The jury having found for the defendant, a rule *nisi* was obtained for a new trial, upon the ground that this presentment was not admissible in evidence.

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Malkin and Whitcombe now shewed cause :

The document came out of the right custody, and was properly authenticated, and if applicable to the case (which must appear on inspection), was receivable in evidence. It is in substance a presentment, for it is a finding by the homage. There is no amercement indeed, because the party submitted to the preliminary investigation. Amercement is only necessary to shew submission, or make it binding or certain. In *Arundell v. Lord Falmouth*,† it was not contended that such presentments were inadmissible.

† 15 R. R. 305 (2 M. & S. 440).

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Here the party claiming was actually heard. If the instrument be not admissible as a presentment, it was, as an award, binding between the *parties and their privies in estate. It may be said that no submission was proved to make it binding, but a submission must be implied between Evan Richards, the owner of Tyr Adam, on the one side, and the tenants of the manor on the other. It might be by parol, and then no other evidence could be expected. It is stated on the face of the presentment, that Evan Richards produced evidence before the homage, from which a submission may be implied. And where an ancient customary professed to be made *ex assensu omnium tenentium*, it was taken to be so: *Denn dem. Goodwin v. Spray*.† Acknowledgment by the homage, that Richards had the right claimed, would be evidence against them.

(LITLEDALE, J.: The lord ought to have been a party.)

The document was at all events admissible as evidence of reputation; it was a declaration by persons who had knowledge on the subject. In *Chapman v. Cowlan*,‡ in case for disturbance of a prescriptive right of common, a paper, signed by many copyholders, reciting the ancient right of common, and agreeing to restrict it, was held to be evidence of reputation of the right recited, even against a person not claiming under any of those who signed. Here the homage jurors were selected by the plaintiff's ancestor. As to their interest, it is no more than that of perambulators; and perambulations are admissible, not as evidence of acts, but as reputation: *Weeks v. Sparke*.§ There a defendant by his plea claimed a prescriptive right of common, and plaintiff by his replication replied a prescriptive right of tillage, which qualified the right of common, and it was held,

+ 1 R. R. 250, 255 (1 T. R. 466, § 14 R. R. 546, 551 (1 M. & S. 679, 473, per ASHHURST, J.). 687, per Lord ELLENBOROUGH).

‡ 12 R. R. 294 (13 East, 10).

that many persons besides the defendant having right of *common over the *locus in quo*, evidence of reputation as to the right claimed by the plaintiff was admissible, a foundation being first laid by evidence of the enjoyment of such right. So in this case, many persons besides the defendant, all the tenants of the manor, take a right of common over the mountain.

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Maule, contra, was stopped by the COURT.

LORD TENTERDEN, Ch. J. :

I am of opinion that this instrument was not admissible in evidence in any view of the case. It was not receivable as a presentment, because the homage had no right to decide the claim made by an individual to the freehold ; and by this instrument they appear to have taken upon themselves to say, that Evan Richards had no right to the soil. Then, secondly, this was not receivable as an award. It is admitted, that it contains no direct allegation that Evan Richards had submitted himself ; but it is said, that we ought to infer a submission. I think, however, we cannot make any such presumption. It appears that the jury were sworn and charged to view such part of the common or waste as was claimed by Evan Richards to belong to his tene-ment, called Tyr Adam. Their authority, which began with the charge of the steward, is to view that part of the waste claimed by Evan Richards. That being the authority originally given to them, the appearance of Evan Richards before the homage, who had no authority to enquire into the ownership of the land, does not give them any power so to do. It is next said that this instrument was evidence of reputation that the plaintiff and those who occupied under him had no more than a right of common upon the *land in question. The answer to that is, that it was a declaration made *post litem motam*, and therefore not receivable as evidence of reputation.

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BAYLEY, J. :

I am of the same opinion. The steward and the homage had no jurisdiction to enter on the trial of the question of exclusive right to this land. The decision was by persons interested in the

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question, for the homage say that Evan Richards had no exclusive right to the soil. Evan Richards claimed the land as his own. The homage say that he has no more than a right of common. They, as tenants of the manor, must have had the same right, and, therefore, were not competent judges to decide that question. Then it is said that the instrument operates as an award, and that the homage may be considered as arbitrators, but the answer to that is there was no submission. It is not evidence by way of reputation, because upon the face of the instrument it appears to have been *post litem motam*.

LITLEDALE, J. :

The instrument was not receivable in evidence as a presentment, because the homage had no jurisdiction to enquire into the right to the freehold. They may enquire into encroachments on the waste, and may direct enclosures to be thrown down, but they have no jurisdiction to enquire whether the soil belongs to any individual, or whether he has a right of common only. Secondly, this is not an award, for there was no mutual submission. To make it good as an award, the lord and the other tenants of the manor ought to have been parties on one side, and Evan Richards a party on the other. But here the lord was no party. It is not *evidence as reputation, because it is the declaration by the homage of a fact *post litem motam*. Besides, the question in the cause was, whether an individual had a right to the soil itself, or only a right of common over it. Now, although reputation be admitted in evidence in questions concerning public rights, it is by no means clear that it is admissible in questions of prescriptive rights merely private. In *Reed v. Jackson*† a verdict against one defendant in trespass upon an issue of a justification of a public right of way negating such right, was held to be evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right; and LAWRENCE, J. there said that reputation would have been evidence as to the right of way in this case; *à fortiori*, therefore, the finding of twelve men upon their oath; and Lord KENYON agreed that reputation was evidence with respect

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† 6 R. R. 283 (1 East, 355).

to public rights claimed as in that case; but not with respect to private rights. So in this case, where the question was, whether the plaintiff had a right to the soil, it seems to me that reputation was not admissible to shew that he had a right of common only; but, however that may be, as the instrument contained a declaration made *post litem motam* it was clearly inadmissible. The rule for a new trial must be made absolute.

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v.
BASSETT.

Rule absolute.

THOMAS v. WILLIAMS.

(10 Barn. & Cress. 664—671; S. C. 5 Man. & Ry. 625; 8 L. J. K. B. 314; S. C. at Nisi Prius, 4 Car. & P. 234, nom. *Williams v. Thomas*.)

1880.
May 7.

[664]

A. being indebted to the plaintiff for half a year's rent of a farm, due on the 25th of March, the defendant, an auctioneer, was about to sell the goods of A. on the premises in the month of August. On the day of the sale the plaintiff (the landlord) came there to distrain for his rent. The defendant, in consideration that the plaintiff would not distrain, verbally promised to pay him not only the rent due, but the rent that would become due at the Michaelmas following: Held, that the promise to pay the accruing rent was merely a promise to answer for the debt of a third person, and therefore void by the fourth section of the Statute of Frauds; and that the promise being entire and in the commencement void in part, was void altogether; and that the plaintiff, therefore, could not recover from the defendant the rent due on the 25th of March.

THE second count of the declaration stated, "that before and at the time of the making of the promise and undertaking therein mentioned, one Thomas Thomas was tenant to the plaintiff of a certain farm and the appurtenances, and was indebted to the plaintiff in the sum of 17l. 10s. for rent in respect of the said farm; and thereupon, in consideration that the plaintiff would forbear from distraining the goods upon the said farm, for and on account of the rent so due from Thomas Thomas, the defendant promised the plaintiff to pay to *him the rent that would be due at the Michaelmas then next following from the said Thomas Thomas to the plaintiff, for and in respect of the said farm." Averment that plaintiff had forborne from distraining; that the rent due at the Michaelmas then next following was 38l. 0s. 6½d., and breach for non-payment of that sum. At the trial before Goulburn, J., at the Spring Great Sessions for Carmarthen,

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v.
WILLIAMS.

1829, it appeared that Thomas Thomas was tenant to the plaintiff of a farm called Gurnos, in the parish of Llangadock, in the county of Carmarthen, at a rent of 40*l.* per annum, payable half-yearly at Lady Day and Michaelmas. The defendant was an auctioneer, and in August, 1827, was about to sell Thomas Thomas's effects. The plaintiff went to Gurnos on the day of the sale, with a bailiff and a notice of distress for 17*l.*, being part of a half year's rent, due on the 25th of March preceding, (the residue having been paid,) and told the defendant that there would be nearly a year's rent due to him at Michaelmas; and that, unless he, defendant, promised to pay him the rent then due, he, plaintiff, would put in the distress. The defendant then verbally promised that, if plaintiff would not distrain for the rent then due, he, defendant, would pay him the rent that would be due at Michaelmas. The plaintiff did not distrain, and the sale proceeded. It was objected that, the promise not being in writing, the case was within the fourth section of the Statute of Frauds, 29 Car. II. c. 3, and that the defendant was entitled to a general verdict. The learned Judge directed a verdict to be entered for the plaintiff on the second count for 22*l.* 10*s.*, (which was a sum formed, partly of rent due at the Lady Day preceding *the promise, and partly of the rent which became due at the following Michaelmas,) and gave the defendant's counsel leave to move to enter a verdict for him on that count also, if this Court should be of opinion that the contract ought to have been in writing. In Easter Term, 1829, John Evans obtained a rule to shew cause why a general verdict should not be entered for the defendant upon the point reserved.

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Russell, Serjt. and *E. V. Williams*, at the sittings in banc after last Term, shewed cause :

It will be argued for the defendant, on the authority of the cases of *Lexington v. Clarke*,† and *Chater v. Becket*,‡ that where part of a promise is within the fourth section of the Statute of Frauds, and is thereby required to be in writing, the whole is void if the promise be merely verbal. Assuming that position to be established, it will not apply to the present case, because

† 2 Vent. 223.

‡ 4 R. B. 418 (7 T. R. 201).

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no part of the promise upon which the plaintiff founds his claim is within the statute. The plaintiff had an undoubted right to distrain the goods upon the farm of his tenant for the rent due at Lady Day. He abandoned that right in consideration of the defendant's undertaking to pay the rent then due, and that which would become due at the Michaelmas following. Here, therefore, is a new consideration (the abandonment of the right of distress), which moves to the defendant, and is totally distinct from any contract between the plaintiff and his tenant. The defendant's undertaking is consequently original and not collateral, and is not affected by the statute, which was only meant to apply to such as are *collateral. The case of *Williams v. Leaper*[†] is in principle exactly like the present. In that case the defendant had promised to pay the debt of the tenant, in consideration of the plaintiff's forbearing to distrain, and allowing the defendant to have the goods liable to the distress, and it was there held that as there was a new consideration for the defendant's promise moving to him, the statute did not apply. The principle thus laid down is supported by the cases of *Read v. Nash*,[‡] *Castling v. Aubert*,[§] *Edwards v. Kelly*,^{||} *Bampton v. Pauline*,[¶] *Tomlinson v. Gill*.^{††} It is true, that, in the present case, the promise extends further than *Williams v. Leaper*, because it applies to rent not due at the time of making it; but there is no rule of law that the consideration and promise should be co-extensive, in order to support an action.

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Campbell and John Evans, contra :

There must be a new consideration to render any promise for the debt of another binding under the fourth section of the Statute of Frauds. The mere fact of the original debtor being indebted, is no consideration at all. If the argument on the other side be correct, the cases of *Wain v. Warlters*,^{‡‡} and *Saunders v. Wakefield*,^{§§} were not within the statute, and the discussion of the sufficiency of the written agreement was in those cases

† 2 Wils. 308; 3 Burr. 1386.

‡ 1 Wils. 305.

§ 2 East, 325.

|| 18 R. B. 349 (6 M. & S. 204).

¶ 4 Bing. 264.

†† Amb. 330.

‡‡ 7 R. B. 645 (5 East, 10; 1 Smith, 299).

§§ 23 R. B. 409 (4 B. & Ald. 595).

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unnecessary; but such a proposition is not tenable, and it is clear, that without a new consideration, any promise to pay the debt of another would be *nudum pactum*. The case of **Williams v. Leaper*,† and all the others which have been cited, are very distinguishable from the present. In all of them the defendant received from the plaintiff, or was permitted by him to receive, certain property on which the plaintiff had a lien, which the defendant promised to discharge on having the property delivered to him. This is the view of that case taken by LE BLANC, J. in *Castling v. Aubert*.; He there says, “This is a case where one man having a fund in his hands which was adequate to the discharge of certain incumbrances; another party undertook that if that fund were delivered up to him, he would take it with the incumbrances: this, therefore, has no relation to the Statute of Frauds.” In the present case, the plaintiff had no lien whatever on the property delivered to the defendant for the rent which was to become due at a future time, and this circumstance distinguishes it from all the authorities cited on the other side. As to that portion of the rent, therefore, the promise was within both the letter and the mischief of the statute, and was unsupported by any consideration. If then that part of the promise relating to the rent which would become due at Michaelmas was within the statute, the cases of *Lexington v. Clarke*,§ and *Chater v. Becket*,|| are decisive to shew that the whole is void.

Cur. adr. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT:

We are of opinion that this action is not maintainable. One Thomas Thomas was tenant to the plaintiff of certain premises, and indebted to the plaintiff in a sum *of about 17*l.* for rent due at Lady Day. In August the defendant, an auctioneer, was about to sell the goods of the said tenant on the demised premises. The plaintiff came to the premises, and required security for his rent. The defendant promised that if the plaintiff would allow the sale to proceed he would pay him the arrears of rent then

† 2 Wils. 308.

‡ 2 East, 325.

§ 2 Vent. 223.

|| 4 R. R. 418 (7 T. R. 201).

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due, and also the accruing rent up to Michaelmas then next. This promise was by word only, without writing. Some money had been paid, but not quite so much as the amount of the arrears due at Lady Day. At the trial a verdict was given for the whole difference between the amount of the money paid and the amount of the rent up to Michaelmas, including in that amount the arrears of the rent due at Lady Day. The question is, whether the plaintiff could recover the whole of that sum, or the difference between the money paid and the arrears due at Lady Day? or whether the whole contract was void? We think the whole was void. Several cases were quoted at the Bar in support of the plaintiff's claim; but there is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made. In *Edwards v. Kelly*† the landlord to whom the promise was made had actually distrained the goods of his tenant, and delivered them to the defendant to be sold in consideration of his promise to pay the rent due for which the distress had been taken. In *Castling v. Aubert*‡ the plaintiff gave up to the defendant policies of insurance on which the *plaintiff had a lien to secure himself against bills which he on the faith of that lien had accepted for the accommodation of the assured, and the person to whom he delivered them promised to discharge the bills and give to the plaintiff the same indemnity that his lien afforded him. In these cases the promise was founded on a new consideration distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand, and releasing that person. In *Williams v. Leaper*§ there was no actual distress, but there was a power of immediate distress, and an intention to enforce it; and I think the Judges must be understood to have considered that power as equivalent to an actual distress. It is not necessary now to decide whether it was rightly so considered, because supposing it to have been rightly so considered, the decision will not go beyond the amount of the arrears then due, and

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† 18 B. R. 349 (6 M. & S. 204).

§ 2 Wils. 308; 3 Burr. 1386.

‡ 2 East, 325.

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for which the right of distress might have been immediately exercised.

But this reasoning will not apply to the accruing and future rent. The plaintiff could not have distrained for that rent. The defendant, by paying all that was due at Lady Day, might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained, but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute, and the mischief intended to be remedied *thereby. And as to so much, therefore, the promise is void by the statute.

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The next question, then, is, whether the promise, being void in part, can be held good as to the other part, viz. the arrears due at Lady Day, in respect of which it might have been good if confined to those arrears. And upon this point the two cases of *Lexington v. Clarke*,† and *Chater v. Becket*,‡ quoted in the argument, are authorities directly in point against the plaintiff. In each of them the promise was as to a part, held not to be within the statute, and as to a part to be within the statute; and the actions proceeded for the recovery of the part not within the statute, the other part having been satisfied. But it was held that the promises were entire, and that being in their commencement void in part, they were void altogether. For these reasons, and upon these authorities, we think the plaintiff can recover nothing. The rule for entering a general verdict for the defendant must therefore be made absolute.

Rule absolute.

† 2 Vent. 223.

‡ 4 B. R. 418 (7 T. R. 201).

COTHAY AND OTHERS *v.* FENNELL AND OTHERS.

(10 Barn. & Cress. 671—673; S. C. 8 L. J. K. B. 302.)

1880.
April 29.

[671]

Where three parties agreed to be jointly interested in certain goods, to be bought by one of them in his own name only, and he made a contract for the purchase accordingly: Held, that all might join in suing the vendor for a breach of that contract.

ASSUMPSIT on a contract for the sale by defendants of a quantity of Barbary gum to the plaintiffs. Plea, the general issue. On the trial before Lord Tenterden, Ch. J., at the London sittings after last Hilary *Term, it appeared that Cothay carried on business in London, others of the plaintiffs at Glasgow, and the rest at Manchester. These three firms had agreed to be interested in the purchase, but that Cothay should be the actual purchaser; and he gave the order, and the broker knew him only. Upon this it was contended, that Cothay alone could sue upon the contract so made. Lord TENTERDEN overruled the objection, and the plaintiffs had a verdict, the defendants having leave to move to enter a nonsuit.

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Gurney now moved accordingly, and contended that the private agreement between the three houses did not give them a joint right of action against the vendors. They were not all parties to the contract, and if the vendors had been obliged to bring an action on the contract, it must have been against Cothay alone.

(LITTLEDALE, J.: Cannot a dormant partner sue on a contract made by the ostensible partners?)

Yes; but there he is a party to the contract.

Per CURIAM:

If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made. In *Young v. Hunter*† GIBBS, Ch. J. puts one special

† 13 R. R. 696 (4 Taunt. 582).

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[*673]

instance to the contrary; but that does not govern the present case. Here, Cothay may be considered as agent for the Glasgow and Manchester houses, *or they may be treated as dormant partners in this transaction; and a dormant partner in one instance, may sue as well as a dormant partner in the general business of a mercantile house.

Rule refused.

1880.
May 4.
[705]

FISHER AND OTHERS v. BOUCHER.

(10 Barn. & Cress. 705—714; S. C. 5 Man. & Ry. 589; 8 L. J. K. B. 306.)

Where a trader being under apprehension of arrest gave directions to his servant to deny him in case A., a sheriff's officer, called: Held, that the sheriff's officer not having called, this of itself was not any evidence of a beginning to keep house.

Semble, that in order to constitute an act of bankruptcy, by departing from the dwelling-house, the departure must be with an absolute intent to delay creditors. If it be only with intent to delay creditors in case a particular event occurs, and that event does not occur, it is not an act of bankruptcy.

ASSUMPSIT for money had and received. Plea, the general issue. At the trial before Gaselee, J. at the Spring Assizes for the county of Dorset, 1880, it appeared that the defendant, who was late sheriff of that county, had executed a *feri facias* on the goods of George Ord Houliston, and the only question in the cause was, whether he had committed an act of bankruptcy? As to that, the evidence was as follows: Houliston, who was a grocer, carrying on business at Blandford in the county of Dorset, on the 11th of June, 1829, received from Francis & Co. in London, who had supplied him with goods, a letter containing a threat of arrest, unless a debt of 70*l.* was paid them. On the *15th of June, Houliston wrote to the plaintiff Thomas Fisher, to whom he was indebted 600*l.*, informing him, that on taking stock, it was impossible for him to meet his creditors in full, and his fear that his estate would pay very little more than 10*s.* in the pound. He then proposed to assign everything to the plaintiff in trust for the benefit of him and other creditors; and added, that it was of the utmost importance that something should be immediately done, as he was threatened with an arrest for 73*l.*, which he could not then pay, although he was certain of

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being enabled at a future time to pay the full amount, provided his affairs could be arranged without being consumed in law. On the same day, Houliston called his shopman into the room behind the shop, and told him that Francis had threatened to arrest him; that he had written to Fisher, his principal creditor, and that possibly his goods would be seized; and he then directed the shopman, if Pitney, the sheriff's officer, came to the door, to say that he (Houliston) was not at home. On the 17th of June, Houliston having told his wife that if any thing particular happened, she was to send to him at the Shillingston turnpike-gate, left home, with the avowed purpose of going his journey through Durweston, Shillingston, and other places in the neighbourhood, (as was his usual custom) to deliver goods which had been ordered before, and to take fresh orders in his business of a grocer. It had been his habit on former occasions to take this journey on a Tuesday. On the Wednesday morning he left home before the mail from London arrived, by which a letter might be received from his creditors Francis & Co., or a warrant by Pitney, the sheriff's officer, to arrest him. His usual time of starting was between eight and *nine o'clock. On this occasion he left home soon after seven. He went on slowly through Durweston, without calling at any house, through the Shillingston turnpike-gate, and stopped at a house a short distance beyond the gate, where he went in, left a small parcel, and settled an account, and waited there till the mail cart came up, when the driver delivered to him a letter from Francis & Co., which had been received at his house after his departure. That letter contained the following passage: "We are not inclined to be unnecessarily harsh in the arrangement of our account. You say you can pay 10s. now, and the remaining 10s. at some future time. Let us have a good guarantee for the payment of the first 10s. at as short a date as can be accomplished, and we will take your own note for the remaining 10s., payable some time hence, provided the time be not too long." Houliston wrote with a pencil on the back of this letter, "I shall now return with comfort to my wife and children;" and sent the letter to his wife by a private hand. He then went on to Tippy Oakford, the next village to Shillingston, called at one house there, and then returned home by a

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different route from that which he usually took. It appeared further, that on the morning of the 17th of June, his wife had packed up some clothes for him in a deal-box, which he was in the habit of taking when he went a long journey. Upon this evidence it was contended, that Houliston had committed an act of bankruptcy, by beginning to keep house, he having given orders to be denied to the sheriff's officer. Secondly, that Houliston committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors. GASELEE, J. was of opinion that Houliston had not committed any act of bankruptcy by *beginning to keep house with intent to delay his creditors, the direction given to the shopman to deny him to the sheriff's officer, if he called, being only evidence of an intention to delay his creditors, but no evidence of an actual beginning to keep house. Upon that point he reserved liberty to the plaintiff to enter a verdict in his favour, in case the Court should be of opinion that the facts proved amounted to a beginning to keep house. Upon the other point, he was of opinion that the question, whether an act of bankruptcy had been committed by the departure from the dwelling-house, depended upon the intention which Houliston had at the time when he so departed. If at that time he intended not to return, unless he should receive a letter from Francis & Co., and should be satisfied with its contents, that might be a departure with an intent to delay his creditors in a given event, and might possibly constitute an act of bankruptcy; but if he departed from his dwelling-house to go his usual rounds in the ordinary course of his business, intending to return, that was not a departing with intent to delay his creditors, and consequently not an act of bankruptcy: and he left it to the jury to say, whether Houliston departed from his dwelling-house with intent to delay his creditors, or merely to go his rounds in the ordinary course of business. The jury found, that he did not depart from his dwelling-house on the 17th of June with intent to delay his creditors, but to go his rounds in the ordinary course of his business.

Wilde, Serjt. now moved, pursuant to the leave reserved, to enter a verdict for the plaintiff, on the ground that Houliston had

committed an act of bankruptcy by *beginning to keep house; or for a new trial, upon the ground that the finding of the jury, as to the intent with which Houliston departed from his dwelling-house, was a verdict against the weight of evidence. As to the first point, he contended, that the act of a trader having given an order to be denied to all creditors, was of itself, according to *Lloyd v. Heathcote*,† sufficient evidence of a beginning to keep house with intent to delay creditors, and constituted an act of bankruptcy, although no creditor was actually delayed. In *Harvey v. Ramsbottom*,‡ a trader, for fear of being arrested, desired his servants not to let into the house any persons whom they did not know; and on the following morning the doors of the house were kept shut, and no person was admitted, until it had been ascertained from the window who he was; it was held, that this amounted to an act of bankruptcy, though no creditor was actually denied. These cases shew that, in order to constitute an act of bankruptcy by beginning to keep house, an actual denial to a creditor is not necessary. Here Houliston's order to be denied to the sheriff's officer was itself an act of bankruptcy, although the sheriff's officer did not call.

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Secondly, the verdict of the jury was against the weight of evidence; for the circumstance of his wife having packed up the clothes at the time when Houliston left his dwelling-house, was the strongest evidence that he did not intend to return. The question is, what was his intention at the moment of departure? It is manifest that his intention was, if the letter from Francis & Co. proved unfavourable, not to return that evening. *He therefore departed from his dwelling-house with intent to delay his creditors.

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LORD TENTERDEN, Ch. J. :

The question reserved by the learned Judge for the opinion of the Court is, whether Houliston committed an act of bankruptcy by beginning to keep house? It appears by the evidence that he had given directions to his shopman, if the sheriff's officer came to the door, to say that he was not at home. If he had followed up that direction by retiring to a part of the house which he did

† 2 Brod. & B. 388.

‡ 1 B. & C. 55.

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not usually occupy, that would have been evidence of a beginning to keep house with intent to delay his creditors, although there was no actual denial to a creditor; but he did nothing of that kind. There is no authority to shew that a mere direction given by a trader to his servant to deny him to his creditors generally, or to any particular creditor by name, not followed up by an actual denial, or by any other act which is evidence of an actual beginning to keep house, is an act of bankruptcy. Here, the facts proved were evidence of an intent to begin to keep house in case the sheriff's officer should call, but not of an actual beginning to keep house. Then, as to the other supposed act of bankruptcy, construing the evidence most favourably for the plaintiffs, it appears that there was nothing more than an inchoate intention by Houliston to delay his creditors, by not returning to his dwelling-house, in case a particular event happened. That event not having happened, he did in fact return to his dwelling-house according to his usual habits. That was a departure, not with an absolute, but only with an inchoate intent to delay; and I am not aware that *this is an act of bankruptcy. Besides, there was ample evidence to warrant the jury in finding that he departed from his dwelling-house with intent to go his rounds in the usual course of business, and not with an intention to delay his creditors; and that being so, there is no ground for saying that he committed an act of bankruptcy by departing from his dwelling-house with intent to delay his creditors.

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BAYLEY, J. :

The jury have found that Houliston departed from the dwelling-house with intent to go his rounds according to the usual course of his business, and not with intent to delay his creditors; and I think that they were warranted by the evidence in the conclusion they came to. Even taking the evidence most favourably for the plaintiffs, I should doubt whether there was any departure with intent to delay creditors; for the bankrupt, at most, only intended to delay his creditors in case a given event should occur. That event did not occur. If the letter had proved unfavourable, and he had delayed, even for a short time, to return home, that might

have been an act of bankruptcy, by absenting himself. But the jury have, by their finding, negatived any such act of bankruptcy.

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Then, as to the beginning to keep house, I am not aware that the giving directions by a trader to deny him to a creditor, unless there be some act done to shew that he began to keep house, is an act of bankruptcy. If Houliston, to prevent his being seen, had retired into a secluded part of the house or adjoining premises, or if there had been an actual denial to a creditor, then such acts would have been evidence of a beginning to keep house.

*In *Lloyd v. Heathcote*,† there was not only a direction to deny, but an actual denial to the collector of the King's taxes; and when he called, the bankrupt retreated into the garden, shewing thereby that he meant to keep himself from the view of persons who called. In *Harvey v. Ramsbottom*‡ there were not only directions to be denied, but the doors of the house were kept shut, and no person was admitted until it had been ascertained from the window who he was. There, the bankrupt was not conducting himself in his usual manner in his own house. The authorities shew that a mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction be followed by an actual denial, or by concealing himself, or by some other act which is evidence of a beginning to keep house. There is a *locus penitentie* for the debtor; for notwithstanding his direction, he may, before a creditor calls, revoke it, and elect to see him; and in that case there would be no beginning to keep house. Unless the direction be followed by some act done by the trader, it is not a beginning to keep house.

[*712]

LITTLEDALE, J. :

I think the question whether there was an act of bankruptcy by departing from the dwelling-house was properly left to the jury, and that their conclusion was warranted by the evidence. The evidence shews, that at the time when Houliston departed from his home, he doubted whether he would return. He intended, if the letter were unfavourable, not to return. He intended in that case to commit an act of bankruptcy by absenting himself. But the letter having *turned out favourably, he

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† 2 Brod. & B. 388.

‡ 1 B. & C. 55.

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did not carry that intent into execution. I think that this was not a departure from the dwelling-house with intent to delay creditors.

Then, as to the question whether there was a beginning to keep house within the meaning of the Bankrupt Act, it seems to have been for some time considered that an actual denial was indispensable to prove an act of bankruptcy by beginning to keep house. But it has been settled, that a denial is not the only evidence of a beginning to keep house: it may be proved by other circumstances. Now, if in this case there was any thing to shew that Houliston, after he had given directions to be denied, had not conducted himself in his house in his usual manner; that he had retired to a secluded part of his house, contrary to his ordinary habits; I think that would have been a beginning to keep house: but there must be some act done by the trader to shew that he actually began to keep house. Here the directions given to deny him to the sheriff's officer were evidence of an intent to keep house, and thereby to delay his creditors, but it was not followed up by any act shewing that he began to keep house.

PARKE, J. :

As to the departure from the dwelling-house, I think the question was properly submitted to the jury, and that their conclusion was right. Houliston may possibly have intended to commit an act of bankruptcy, if the information he should receive at the turnpike proved unfavourable. It was more favourable than he expected; and he returned to his dwelling-house according to his usual habit.

[*714] As to the other question,—the beginning to keep house,—the authorities only shew that an actual denial to a *creditor is not necessary to constitute a beginning to keep house; but that it may be evidenced by other circumstances. It is sufficient, if the creditor or creditors be excluded from the debtor while he remains in or about his house. Here Houliston gave directions to his shopman to deny him to the sheriff's officer: that shewed an intention to delay his creditors. But a simple intention to delay creditors is not of itself a beginning to keep house.

Rule refused.

DOE D. BENJAMIN JONES v. MICHAEL JONES
AND OTHERS.

1890.
May 4.

(10 Barn. & Cress. 718—721; S. C. 5 Man. & Ry. 616; 8 L. J. K. B. 310.)

[718]

Where a minister of a dissenting congregation, after his election, was placed in possession of a chapel and dwelling-house by certain persons, in whom the legal fee was vested in trust to permit and suffer the chapel to be used for the purpose of religious worship: Held, that he was a mere tenant at will to those persons, and that his interest was determinable by a demand of possession without any previous notice to quit.

EJECTMENT. Plea, not guilty. At the trial before Raine, Ch. J., at the Great Sessions for the county of Merioneth, 1890, it appeared that the action was brought to recover possession of a chapel and dwelling-house. By lease and release of the 5th of August, 1783, J. K. and L. R. bargained, sold, and assigned unto Benjamin Jones, and nine other persons therein named, and to their heirs and assigns, a piece of land therein particularly described, and the structure or meeting-house thereon erected and built, to have and to hold the same, with their and every of their appurtenances, unto the said Benjamin Jones and the nine other persons *therein mentioned, and their successors, ministers of the respective meeting-houses or places therein mentioned for the time being, for ever, in trust, and to the intent and purpose, that the said structure or building should be used as a meeting-place or house for public and religious worship, by the society or congregation of protestant dissenters called Presbyterians; and that they should permit and suffer the same from time to time to be used, occupied, and enjoyed, as and for a meeting-house, place or house for such public and religious worship, by such society or congregation of protestant dissenters, and to or for no other use, intent, or purpose whatsoever. It appeared further, that the defendant Michael Jones had been, according to the usual practice, elected by the congregation minister of the chapel sixteen years ago, and was then put into possession of the house and premises by officers acting under the authority of the trustees. At a meeting of the congregation, in the year 1828, it was determined by a large majority that the minister should be changed; but no other minister was elected. Possession of the chapel, dwelling-house, and premises, was demanded of the

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defendant Michael Jones on behalf of the trustees, but he refused to go out. Benjamin Jones was the last surviving trustee of those named in the deed ; and his grandson of the same name was his heir-at-law, and was the lessor of the plaintiff. On this evidence it was contended, that the lessor of the plaintiff could not recover possession of these premises against the defendant so long as he continued minister of the chapel. By the very deed under which the lessor of the plaintiff claimed, the trustees held it in trust, to permit and suffer it to be used as a place of religious worship. The defendant was duly elected to fill the office *of minister of the chapel, and had an office coupled with an interest, and continues to hold such office until another minister has been duly elected according to the usual course adopted on former occasions. RAINE, Ch. J. was of opinion that the legal estate was in Benjamin Jones, the heir-at-law of the last surviving trustee mentioned in the deed ; and directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit.

Campbell now moved accordingly :

The trustees cannot recover in ejectment against the present defendant, so long as he continues minister ; and he having been duly elected, continues minister until another has been appointed by the congregation. The proper course would have been for the congregation to elect another minister ; and then the Court, by *mandamus*, would have compelled the defendant to give him possession of the chapel, &c. So long as the defendant continues in his office of minister, he has a possessory right to the house. In *Rex v. Baker*,† Lord MANSFIELD says, speaking of such a case as the present, “ The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust : for the meeting-house, and the land upon which it stands, could not be limited to Enty (the minister) and his successors. Many lectureships and other offices are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The

† 3 Burr. 1265.

use of the meeting-house and pulpit in this case follows, by necessary consequence, *the right to the function of minister, preacher, or pastor, as much as the insignia do the office of a mayor, or the custody of the books that of a town clerk."

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(PARKE, J.: The *mandamus* was to admit the party elected to the use of the pulpit as pastor, minister, or preacher. That is like an easement, a right of common or of way. In this case the defendant had no other estate in the premises than that of tenant at will, and that has been put an end to by the demand of possession. The trustees have a right to the chapel. It is possible the defendant may have a remedy against them in equity, if they have improperly turned him out.)

LORD TENTERDEN, Ch. J. :

For the reasons given by my brother PARKE, I think it perfectly clear that the legal estate in the premises was in the lessor of the plaintiff.

Rule refused.

DOE D. NICHOLL AND OTHERS v. M'KAEG.

(10 Barn. & Cress. 721—724; S. C. 5 Man. & Ry. 620; 8 L. J. K. B. 311.)

A minister of a dissenting congregation placed in the possession of a chapel and dwelling-house by certain persons, in whom the legal estate is vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those trustees; and his tenancy is determined *instantly* by a demand of possession. He is not entitled *de jure*, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture.

Semble, that he will not be a trespasser, if he enter afterwards to remove his goods, and continue a reasonable time for that purpose.

EJECTMENT for a chapel, two messuages, and two yards. Plea, not guilty. At the trial before Sir J. A. Park, J., at the last Assizes for the county of York, it appeared that the defendant was a dissenting minister, the premises sought to be recovered being the meeting-house and dwelling-house adjoining thereto; that both the dwelling-house and meeting-house had been conveyed to *the lessors of the plaintiff as trustees for the congregation; that they had placed the defendant in the possession of the same on his having been elected minister by the members

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of the congregation; that the latter having become dissatisfied with some of the doctrines of the defendant, in consequence wished to remove him, and came to a resolution to that effect. The trustees demanded possession, and immediately served a declaration in ejectment. The defendant had an annual salary of 20*l.*; and it was objected at the trial, that the defendant was entitled to some notice to quit. The learned Judge reserved the point, and a verdict passed for the plaintiff. On a former day in this Term,

F. Pollock moved pursuant to such leave:

The defendant was entitled to some notice, and as, without any previous notice, the declaration in ejectment was served immediately after the demand of possession, the plaintiff ought to have been nonsuited. The defendant was not, strictly speaking, a tenant at will; he was occupying the house exclusively; which distinguishes this case from that of a servant occupying part of his master's house: he was a tenant of some sort; he was, in fact, occupying the house as part of his reward for doing the duties of minister to the chapel. If he had been paid entirely by a salary, and had rented the house of the trustees, it is clear he would have been a tenant entitled to a regular notice to quit. Instead of paying rent in money, he paid rent by his services. Supposing that he was not entitled to a regular notice to quit, he was entitled to a reasonable notice, and could not, at a moment's warning, be called upon to go out with his family and furniture into the street at the peril of being *dealt with as a trespasser. In all cases of a continuing contract, some reasonable notice must be given of putting an end to it. It is for the Court or jury to say what is a reasonable notice; but surely an exclusive occupation of a dwelling-house, as a part of a minister's reward, cannot be determined without some notice. Here there was none.

Cur. adv. vult.

LORD TENTERDEN, Ch. J.:

This was an ejectment brought to recover from the defendant, who was minister of a dissenting congregation, a chapel and dwelling-house, which he was put in possession of by the lessors of the plaintiff, in whom the legal estate was vested, in trust to

permit the chapel to be used for the purpose of religious worship. The defendant was tenant at will to them. It was contended, that a demand of possession was not sufficient in this case to determine the tenancy, but that a reasonable time ought to have been allowed the defendant for the purpose of removing his goods. We can find no authority in the law for such a position. The general rule is, that where an estate is held at the will of another, a demand by that other determines the will. If, in this case, we were to hold otherwise, we should introduce a new rule, not to be found in the books, which might be productive of great inconvenience; for then, in every case of a tenancy at will, it might be made a question, what is a reasonable time for removing goods. If the tenant, after the determination of his tenancy in this case, by a demand of possession, had entered on the premises for the sole purpose of removing his goods, and continued there no longer than was necessary for *that purpose, and did not exclude the landlord, perhaps he might not have been a trespasser; but, however that may be, we are of opinion, that he being a tenant at will, his estate was determined by a demand of possession, and, consequently, that the lessors of the plaintiff were entitled to recover.

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Rule refused.

RICHARD HALFORD v. KYMER AND OTHERS.

(10 Barn. & Cress. 724—729; S. C. 8 L. J. K. B. 311.)

1830.
May 4.

[724]

The statute 14 Geo. III. c. 48, by section 1 enacts, "that no insurance shall be made on lives, or any other event, wherein the person for whose benefit the policy shall be made shall have no interest; and that every such assurance shall be void;" and by section 3, "that in all cases where the insured hath interest in such life or event, no greater sum shall be recovered or received from the insurers than the amount or value of the interest of the insured in such life, or other event:"

Held, that in order to render a policy valid within the meaning of this Act, the party for whose benefit it is effected must have a pecuniary interest in the life or event insured; and that therefore a policy effected by a father in his own name, on the life of his son, he not having any pecuniary interest therein, was void.†

THIS was an action of covenant on a policy of insurance, dated the 13th of February, 1826, whereby the directors of the Asylum

† But if the insurers choose to pay to the father: *Worthington v. Curtis* on such a policy, the money belongs (1875) 1 Ch. Div. 419.—F. P.

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Life Insurance Company agreed with the plaintiff to insure the life of Robert Bargrave Halford, the son of the plaintiff, in the sum of 5,000*l.* for the term of two years, and covenanted, that if Robert Bargrave Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the company should be liable to pay, within six calendar months after proof of the death of the said Robert Bargrave Halford within the said term of two years, unto the said Richard Halford, his executors, &c. the sum of 5,000*l.* Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said Robert Bargrave Halford. Secondly, that at the time of the death of the said Robert Bargrave Halford, *the plaintiff was not interested in his life. At the trial before Lord Tenterden, Ch. J., at the Middlesex sittings after last Term, it appeared from the statement of the plaintiff's counsel, that by a settlement, dated the 18th of May, 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of 8,000*l.*, and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives, in trust for the children or child of the said marriage, according to the appointment of the said plaintiff, and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; and if no child of the said marriage, or issue of such child, should become entitled to the vested interest in the said trust moneys, then upon such trusts as the said S. T. Bargrave should appoint; and in default of her appointment, in trust for her next of kin as if she had died intestate and unmarried. There was only one child of the marriage, namely, Robert Bargrave Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by Act of Parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, Robert Bargrave Halford, before he attained the age of twenty-one. The said Robert Bargrave Halford did attain the age of twenty-one years

on the 2nd of June, 1827, and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the plaintiff, his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, *proved his son's will in the Prerogative Court of the Archbishop of Canterbury. Upon this statement of facts, Lord TENTERDEN was of opinion that the plaintiff, not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the statute 14 Geo. III. c. 48, s. 3, and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict if the Court should be of opinion that he had an insurable interest.

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F. Pollock now moved accordingly :

It is quite clear that, but for the statute 14 Geo. III. c. 48, this policy would be available. That statute, by sect. 1, enacts, "that no insurance shall be made by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expenses of his maintenance and education. This clearly was not a wagering policy within the meaning of that clause. It is true that the third section enacts, "that in all cases where the assured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events." It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and although his own income may be of the most ample *kind, not depending on his own exertions or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son or his wife? If a man be deprived of the comfort,

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society, and assistance of his wife by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely the law which gives a man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty which for ever deprives him of that assistance.

(BAYLEY, J. : In *Innes v. The Equitable Assurance Company*† (which was tried before Lord Kenyon), the plaintiff had effected a policy on the life of his daughter. In order to shew that he had an interest, he produced a paper, purporting to be a will, by which it appeared that he was entitled to the sum of 1,000*l.* in the event of his daughter dying under the age of twenty-one. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses ; but another of those witnesses stated, that it was not made at Glasgow, but by a schoolmaster in the Borough. Innes was tried, convicted, and executed for the forgery, and Gardiner, who had sworn that the will was made at Glasgow, was convicted of perjury.

[*728] LORD TENTERDEN, Ch. J. : It was in effect admitted, in that case, that it was necessary to prove that the father had a pecuniary interest in the life of his daughter, otherwise *there would have been no occasion to go into the question as to the will ; and unless it were a fact material in the case, the witness could not have been convicted of perjury.)

That was only a *Nisi Prius* case. But a father has a legal interest in the life of his son sufficient to entitle him to insure. By the statute of Elizabeth, if a father become poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminishes the chance of his being paid. So, if a son dies, the chance of the father being maintained in poverty and old age is diminished.

* Apparently unreported.

(BAYLEY, J. : The parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son.)

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The amount of maintenance which a parish must afford may, in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on his son, when he has no claim on the parish. He may not be able to shew his settlement in the parish from which he claims relief. In that case the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word "interest" in the Act of Parliament is not to be confined in construction to pecuniary interest, but may be taken to mean legal interest; and the third section, which allows the insured to recover to the amount or value of his interest, shews that the law would recognise an interest of any kind, provided a value can be set upon it.

LORD TENTERDEN, Ch. J. :

I retain the opinion which I expressed at the trial, that the word "interest" in this statute means pecuniary interest.

BAYLEY, J. :

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It is enacted by the third section, "that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives." Now, what was the amount or value of the interest of the party insuring in this case? Not one farthing certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better.

LITLEDALE and PARKE, JJ. concurred.

Rule refused.

1830.
May 7.

GAUSSEN AND OTHERS *v.* W. MORTON AND
E. MORTON.†

[731]

(10 Barn. & Cress. 731—734; S. C. 5 Man. & Ry. 613; 8 L. J. K. B. 313.)

A. being indebted to B., in order to discharge the debt executed to B. a power of attorney, authorizing him to sell certain lands belonging to him, A. : Held, that this, being an authority coupled with an interest, could not be revoked.

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TRESPASS for breaking and entering two closes in the county of Hertford. Plea, first, the general issue; secondly, that the closes in which, &c. are parcel of the manor of Park in the county of Hertford, and customary tenements of that manor demised and demisable by copy of court-roll by the lord of the said manor, or his steward for the time being, to any person or persons willing to take the same in fee-simple or otherwise, at the will of the lord, according to the custom of the manor; and that before the said time when, &c. to wit, on, &c. the Earl of Essex, then being lord of the said manor, at his Court Baron then holden in and for the manor before P. C., then his steward of the Court of the said manor, by copy of the court-rolls of the said manor granted to one J. L. the said closes in which, &c. in fee, at the will of the lord, according to the custom *of the manor. By virtue of which grant the said J. L. afterwards, and before the said time when, &c. to wit, on, &c. entered into the said closes, in which, &c., and became and was seised in fee thereof, &c., and died seised; whereupon the same descended to one M. L. as eldest daughter and heiress of J. L., whereby the said M. L. became and was seised in fee of the said closes in which, &c.; and being so seised, intermarried with W. Morton, the defendant, whereby the said W. M. and M. his wife, in right of the said M., became and were seised in fee, &c.; wherefore the said W. M. in his own right, and E. M. by his command, and as his servant, broke and entered the said closes in which, &c. Replication, that J. L. at the time of his death was not seised of and in the said closes in which, &c. as defendants have alleged. Issue thereon. At the trial before Tindal, Ch. J., at the last Hertfordshire Spring Assizes, it appeared in evidence,

† Followed by the Court of Appeal *Mining Co.*, '96, 2 Ch. 643, 65 L. J. Ch. in *In re Hannan's Empress Gold* 902, 75 L. T. 45.—R. C.

that in 1787 J. L. became bound to William Forster & Co. for a debt of 231*l.* due to them from his son. The money not having been paid according to the condition of the bond, J. L., in order to discharge the debt, being seised in fee of the customary premises in question, executed a power of attorney on the 3rd of December, 1787, authorizing W. Forster to appear for him at the then next or any subsequent Court Baron or customary Court holden in and for the manor of Park, and surrender the said premises to the use of such person or persons as might become purchasers thereof; and he further authorized W. Forster to sell the premises, and receive the purchase-money. Under this power W. Forster, on the 7th of February, 1788, sold the premises by auction for 105*l.*, and received 20*l.* from the purchaser as a deposit. On the 12th of April, 1788, *J. L., alleging that W. Forster had violated some stipulation in the agreement between them, executed a deed-poll revoking the power given to W. Forster, and gave notice thereof to the steward of the manor. On the 15th of May, 1788, W. Forster applied to the steward to take his surrender of the premises to the use of the purchaser. The steward at first refused to do so, on account of the revocation of the power; but afterwards, an indemnity being given to him, he took the surrender, and admitted the purchaser, from whom a title was deduced to the plaintiffs. The plaintiffs being in possession, defendants entered and carried away some hay. For the defendant it was contended, that as J. L. revoked the power of attorney before the surrender was made, he died seised of the premises as the plea alleged. The LORD CHIEF JUSTICE reserved this point, and the plaintiffs obtained a verdict, subject to a motion to enter a nonsuit.

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MORTON.

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Brodrick now moved accordingly :

The authority given in this case had not been executed at the time when the alleged revocation took place; and according to the opinion of HAUGHTON, J. in *Webb v. Paternoster*,† a licence, when executed, is not countermandable; but it is otherwise while it remains executory. In *Walsh v. Whitcomb*‡ Lord KENYON held, that a power of attorney given as part of a

† Poph. 151.

‡ 2 Esp. 565.

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security for money, was not countermandable; and in *Watson v. King*,† Lord ELLENBOROUGH expressed a similar opinion; but that was not the point before the Court; and in *Walsh v. Whitcomb* the power had been executed before the countermand.

Cur. adv. vult.

[734] LORD TENTERDEN, Ch. J. now delivered the judgment of the Court :

The question, whether J. L. died seised of the premises in which the trespass was alleged to have been committed, depended upon this : whether he could revoke the power of attorney given to Forster. We think that it was not a simple authority to sell and surrender the premises, but an authority coupled with an interest ; for Forster was to apply the proceeds in liquidation of a debt due to himself and his partners ; and there are several cases in which it has been held, that such an authority cannot be revoked.

Rule refused.

1830.
May 11.
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BARTLETT v. PENTLAND.

(10 Barn. & Cress. 760—776 ; S. C. 8 L. J. K. B. 264 ; Lloyd & Welsby, 235.)

An insured who resided at Plymouth employed an insurance broker in London to recover a loss from the underwriters ; and the latter adjusted the loss by setting off in account against it a debt due to them from the broker for premiums. The name of the underwriter was then struck off the policy. It was proved to be the custom at Lloyd's Coffee House in London to consider such set-off as payment between the broker and underwriter. The broker became bankrupt, and never paid the money to the insured : Held, that the set-off in account between the underwriter and the broker was not payment to the insured, inasmuch as the broker had only authority to receive payment for the insured in money ; that the custom which prevailed at Lloyd's Coffee House was not binding on the insured, who were not shewn to be cognizant of it, or to have assented to it ; † and that the erasure of the name of the underwriter from the policy, that not having been done with the assent of the insured, did not discharge the former.

THIS was an action to recover a total loss of 835*l.* upon a policy of insurance for that amount, effected with the St. Patrick's

† 16 R. R. 790 (4 Camp. 272).

‡ *Contra*, where the insurance was ordered by a merchant in Liverpool, where the custom is well known. *Stewart v. Aberdeen* (1838) 4 M. & W. 211, 7 L. J. (N. S.) Ex. 292. The

principle as to notice of the usage being necessary to charge the principal is applied by FRY, J. in *Pearson v. Scott* (1878) 9 Ch. D. 198, 47 L. J. Ch. 705.—R. C.

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Insurance Company, of which the defendant was secretary. Plea, general issue. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1827, the jury found a verdict for the plaintiffs, damages 835*l.*, subject to the opinion of this Court on the following case :

The plaintiffs, who are corn merchants, carrying on business near Plymouth in the county of Devon, were owners of a cargo of wheat shipped on board the ship *Rose* on a voyage from Boston to Plymouth ; and by one James Mitchell, an insurance broker, effected an insurance on the said cargo in the said ship, to the amount of 835*l.*, with the St. Patrick's Insurance Company, at their office in Lombard Street in the city of London.

*This company was established in the year 1824, and by an Act of Parliament passed in the 5th Geo. IV. c. clx. is enabled to sue and be sued by its secretary. Their business was and is carried on in London, at the office in Lombard Street. The policy was in the usual form, stating that Mitchell, as well in his name as for and in the name and names of all and every other person and persons to whom the same did, might, or should appertain, did make insurance. In the copy of the policy, forwarded by Mitchell to the plaintiffs, he was stated to be agent. The agent of the company, when the policy was effected, knew that it was effected by Mitchell as agent to the plaintiffs, and on their account, the letter of instructions having been communicated to him. The ship sailed on the voyage in question, and a total loss of the cargo happened by perils of the seas in November, 1825 ; and on the 4th of December following the plaintiffs wrote a letter to Mitchell, containing the following passage : " We hope you will get the amount of insurance for us. You of course know better how to act than we do, as we never lost a vessel or cargo before. We have been in the habit of insuring for more than thirty years."

On the 30th of December an adjustment of a total loss on the policy was made on behalf of the said company, as follows : " The company agree to settle a claim 100*l.* per cent. for total loss on policy, 835*l.*" Mitchell, the insurance broker, produced to the agent of the company the original policy of insurance, and the adjustment was written upon it in the usual manner.

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v.
PENTLAND.
[*762]

Mitchell had an account with the company, and effected from time to time insurances for other people with them. On the *day of making the adjustment the sum of 835*l.* was placed by the company to the credit of Mitchell in that account, and, at the same time, a pen was struck through the name of the company's agent subscribed to the policy and to the memorandum of adjustment. On the 3rd of January, 1826, Mitchell wrote to the plaintiffs a letter, from which the following is an extract : "I am in receipt of your esteemed favour of 1st instant. I received an answer from Dunkirk to my letter respecting the loss of the *Rose*, but not any more satisfactory than the account which appeared in Lloyd's List: they mention that a vessel had come on shore to the eastward of their harbour, but that no trace could be found of any of the crew, nor of any papers, nor even of the cargo she had on board; only a boat had been found near the spot, marked '*Rose*, of Jersey,' and a spar branded in the same way. Under such circumstances, the underwriters on your policy might have kept us out of a settlement for twelve months, as is the custom where no direct proof can be brought forward. They have, however, in this instance, agreed to settle at the regular time. The customary payment here is to wait one month, and then draw at three months; but you are now at liberty to value for half the amount at three months, and in a few posts I hope to be able to hand you a regular account of what the balance will be, when you may value on me for the same at four months." To this letter the plaintiffs, on the 7th of January, returned the following answer : "We are glad to hear you have agreed to settle with the underwriters; you will please to draw on them bills of 200*l.* and 300*l.* each, and remit us the drafts. We *should think they can have no objection for you to draw on them for the full amount. You will please to furnish us with your account of insurance for the last year, that we may remit you the amount. This is the first cargo we ever lost, and we trust it will be the last." On the 11th of January Mitchell replied to this letter as follows: "You appear to have misunderstood me about drawing for the loss per *Rose*. The underwriters here will not accept for losses. In the present case, the company might have kept you out of a

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settlement for twelve months and a day, which is according to law; but, on urging the matter with them, they have agreed to waive that point, and to settle, unless something turn up to throw a doubt upon the loss of the vessel. As I mentioned to you before, the established custom here is, for the assured to wait a month after the underwriters have agreed to settle, and then draw at three. In the present instance, I give you leave to draw now for 400*l.* at three months, subject to one month's discount, and 400*l.* at four months, writing me a letter engaging to provide for the bills in the event of the company not paying. You may draw these amounts in such sums as best suit your own purpose." The plaintiffs replied by letter, and enclosed therein two bills of exchange for Mitchell's acceptance, value 400*l.* each, which he duly accepted.

No balance was struck at the date of the adjustment, nor was any struck until the 1st March following, when, after crediting Mitchell's account, the amount of the loss on the policy in question, a balance of 228*l.* 4*s.* 1*d.* was due by the company to Mitchell, which was paid to Mitchell. On the 9th of April, *1826, Mitchell became insolvent; and not having paid the said bills, or any part of the said 835*l.* to the plaintiffs, they were obliged to take up the bills. The placing of the said sum to the credit of Mitchell in the account between him and the St. Patrick's Company was a *bonâ fide* transaction on the part of the company, and not made in contemplation of Mitchell's insolvency. It was proved on the trial, that the usage of Lloyd's Coffee House in the city of London, where a great majority of marine insurances are effected, is, that when a policy is adjusted, payment is made at the expiration of a month, at which time the broker's account is credited with the amount of the loss; and if the premiums due fall short of such amount, the balance is paid to the broker in cash. If, at the time of adjustment, the amount of the premiums due from the broker to the underwriter exceeds the amount of the loss, it is usual for the underwriter to strike his name off the policy at that time, but the broker is not credited till the end of the month, it being considered that during the interval the assured may call for the money from the underwriter. In the present case, the amount of premiums due

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from Mitchell to the defendants when the loss was adjusted was 1,072*l.* 2*s.* 9*d.* The plaintiffs did not call for the money from the underwriters within a month, nor until after the failure of Mitchell. Neither the policy nor adjustment, nor any notice of the adjustment, nor any notice of the credit in account given to Mitchell, was sent to the plaintiffs, but the policy remained in the hands of Mitchell till after his insolvency. The question for the opinion of this Court was, whether the credit given to Mitchell in *account, or the payment of the balance of that account to him, under the circumstances above stated, was a payment to the plaintiffs, in part or in all, of the said sum of 835*l.*? If the Court should be of opinion that it was not, the verdict to stand; if otherwise, a nonsuit to be entered, or a verdict for such sum as the Court should direct.

Campbell for the plaintiffs:

The plaintiffs are entitled to recover the sum of 835*l.* The defendant adjusted the loss payable within a month, and is liable to pay the sum for which he subscribed his name, unless he has paid that sum to the assured or has been released. The defendant alleges that he has paid Mitchell, the broker, by setting off in account the loss against premiums due from Mitchell to him. The only question is, whether Mitchell had authority from the assured to receive payment from the defendant in that mode? He was the agent of the assured for certain purposes, viz. to receive the amount of the loss from the underwriter in money: that was the only authority given to and accepted by the broker: *Todd v. Reid*,† *Russell v. Bangley*.‡ But money was not paid to Mitchell. The defendant, therefore, continues liable. As to the usage at Lloyd's to allow such settlement in account to be considered payment as between broker and underwriter, first, the defendant is the secretary of an Irish company. The policies are Irish policies. Though the agent of the company may reside here, *still he signs them for underwriters who reside in Ireland. They cannot be bound by a custom which prevails in London; and the plaintiff, who resides in Plymouth, cannot be bound by such a custom. But,

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† 4 B. & Ald. 210.

‡ 4 B. & Ald. 395.

secondly, the custom as stated was not pursued. The transfer is to be made to the credit of the broker at the end of a month. Here it was done instanter. *Russell v. Bangley*[†] is an authority strongly in point. There, indeed, the name of the underwriter remained on the policy: here it has been erased. But Mitchell had no authority from the assured to release the underwriter; and his having struck out the name, or authorized it to be done, cannot operate as a release. Suppose that a bill or bond were given to an agent to receive the money, and the agent allowed the debtor to set off a debt, and erased his name from the bill or bond: that would not have any effect.

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(BAYLEY, J.: The name was erased too on the 30th of December, when the adjustment was made; on any supposition that was too soon.)

The defendant is not entitled to consider the sum of 298*l*. which he paid to Mitchell in money as payment to the assured. That sum was paid on the general account, and not on account of the particular policy.

Maule, contra:

The first letter set out, in which the plaintiffs say, "You of course know the matter better than we do," and several passages in the subsequent letters shew that the plaintiffs employed Mitchell as agent to transact the business in the usual manner; *and although Mitchell misrepresented the custom, the plaintiffs never objected to have the business conducted according to the custom. The custom may be legally binding on the assured. The underwriters, though established as a company in Ireland, have an agent in England who effects policies for them. They may, therefore, be bound by the usage as well as if they resided in England.

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(BAYLEY, J.: In *Gabay v. Lloyd*[‡] it was held, that a usage at Lloyd's did not bind a person not cognizant of it.)

In *Todd v. Reid*[§] the report is very short, and the judgment,

[†] 4 B. & Ald. 395.

[§] 4 B. & Ald. 210.

[‡] 27 B. R. 486 (3 B. & C. 793).

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taken literally, goes too far. It is not a case of great authority. In the subsequent case of *Russell v. Bangley*[†] it seems to have been admitted that such a usage might be valid and binding. In *Thorold v. Smith*,[‡] the defendant being indebted to Sir Charles Thorold in 100*l.*, Sir Charles sent his servant to receive the money. The servant took the goldsmith's note upon one Johnson, and thereupon gave a receipt to Smith. Johnson broke within a week after. HOLT, Ch. J.: "Sir Charles gave no receipt, but the servant. Where a man has authority to receive money, he cannot receive any thing else. It is a common practice, if a man receive a goldsmith's note, and give a receipt; it is purchasing the bill. In this case it must be understood according to the course of the world and trade, that his servant had a general authority to do what his master would have done. This case differs much from the case of a servant or attorney to *one particular purpose, but this is in nature of a factor, &c." Here Mitchell had not merely a special authority to receive the money, but a general authority to do what was usual. In ordinary cases the authority of the broker is derived from the possession of the policy. *Russell v. Bangley*[†] is strongly in favour of the defendant. There the underwriter was held to be liable because his name was not struck off the policy. Lord TENTERDEN there said, "If that be done, and the plaintiff forbears to call upon him within the period warranted by the usage of trade, then the underwriter is discharged; but otherwise he is not."

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(BAYLEY, J.: That must be understood to apply only where the name is struck off with the assent of the assured. There is no ground for presuming that the name of the underwriter was struck off the policy with the privity of the plaintiffs.)

At all events, the defendants are entitled to deduct the sum of 228*l.* paid in money by the defendant to Mitchell.

Campbell, in reply :

The sum of 228*l.* was not paid to Mitchell on account of the

[†] 4 B. & Ald. 395.

[‡] 11 Mod. 71, 87.

loss on the policy, but generally on account. If the principal, knowing of the adjustment, had allowed the underwriter, on the faith of that adjustment, to give new credit to the broker, the assured would have been bound; but when no new credit was given, the set-off cannot be allowed. Here there was no fresh credit given by the underwriter to the broker.

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LORD TENTERDEN, Ch. J. :

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I am of opinion that the plaintiff is entitled to recover. An authority given by a principal to his agent to receive money cannot be construed into an authority not to receive money, but to allow the debtor to write off so much as may be due from the agent to him. If that were allowed, it would enable the agent to collude with the debtor to defraud the principal. If the authority was originally to receive money and not to allow a set-off, the fact which exists in this case, of the broker having struck out of the policy the name of the underwriter, was an act not authorized by the principal: for, if he did not authorize the broker to accept a set-off in payment, he cannot be supposed to have authorized him to do an act which would amount to a release of the debt. The fact of the name of the underwriter having been struck off the policy may have that effect, provided it be shewn to have been done with the consent of the assured. It appears by the report of *Russell v. Bangley* that I said that if the name of the underwriter were struck off the policy, and the assured forbore to call for payment within the period warranted by the usage of the trade, the underwriter might be discharged. The expression is, that he *might* be, not that he *would* be. I should certainly have expressed myself more accurately if I had added, "if the name were struck off with the assent of the assured." My brother BAYLEY in that case did add that qualification; and BEST, J. intimated, that, in order to discharge the underwriter, the name must be struck off with the plaintiff's privity. Here there is nothing to shew that the name of the underwriter was struck off *the policy with the consent of the assured. If that were the fact, it might have been proved. Nothing appeared to raise such a presumption. As to the supposed usage at Lloyd's; the usage in a particular

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place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage and adopt it. Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it. But there is nothing in the case to raise such a presumption against the present plaintiffs; on the contrary, there is every thing to rebut such a presumption. It appears by the letters that the plaintiffs were ignorant of the usage; for they allowed themselves to be imposed upon by the representation which Mitchell made to them, and acted on his misrepresentation. This was the first loss that ever occurred in their experience; so that they had no opportunity of becoming acquainted with the usage. Then, if the original transaction on the 30th of December was not binding on them, has any thing occurred since which can give the defendant the benefit of any partial payment the company may have made to the broker? If the plaintiffs had by their neglect, even though that neglect had been induced by the misrepresentation of their agent, placed the defendant in a situation different from that which he might have been in if no such neglect had taken place, there might be ground for contending that, in point of justice, they, and not the defendant, ought to be losers. But there has been nothing of that kind, because the transaction which took place after the 30th of December will *be found not to be of that character. After the 30th of December, the defendant was indebted to Mitchell, the broker, in a large sum of money. The payment made to Mitchell subsequently to that time must be understood to have been made in respect of that debt. The transaction of the 30th of December was treated as complete and perfect. The defendant therefore has sustained no inconvenience by any thing that has occurred since.

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BAYLEY, J. :

I am of the same opinion. In this case, the company knew, at the time when the policy was effected, that it was effected for the benefit of the plaintiffs; and a loss having occurred, they were bound to pay that loss, either to the plaintiffs them-

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selves, or to some person who was duly authorized by the plaintiffs to receive it; and in making the payment to a third person, it was their duty to see whether he was authorized or not. Here, the company, knowing who the principals were, might have paid the broker by accepting a bill payable to the order of the principals; and by adopting that course, would have been perfectly secure. But if, instead of making the payment in that way, they make the payment to the broker in a manner which gives the latter an opportunity of misapplying the money, then as the broker was not authorized to receive payment in that way, it was done at the peril of the underwriters. Here, the plaintiffs, in their letter of the 4th of December, say, "We hope you will get the amount of insurances for us." That gives authority to the broker to get payment in money, but not in any other way. Now, suppose that letter had been exhibited to the *underwriters, they would have known that he had authority to receive payment, and that they ought to pay him in such a manner as to enable him at once to pay his principals and make a remittance to them. If they had paid the broker in money, it would have become his duty to have transmitted the money to the plaintiffs, and they would have been the sufferers if he had omitted to transmit the money to them; but as the company did not put Mitchell in the possession of money, so as to give him an opportunity of transmitting that money to the principals, but merely wiped off a debt of their own, and paid not by money but by set-off, they did that which was not authorized by the plaintiffs. Suppose, at the time the plaintiffs had sent the authority, the company had communicated to them that they would pay Mitchell not by money, but by set-off, can it be supposed that the plaintiffs would have assented to such a mode of payment? They would have repudiated it, and said, that the defendants must pay them, the plaintiffs, in money, and that they had nothing to do with debts between Mitchell and the defendant. If the defendants had looked at the language of this letter, that appears to me the line of conduct which they would have been bound to have adopted; and if they had adopted that line of conduct, namely, by paying in money, Mitchell would, if he

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were an honest man, have transmitted that money to the present plaintiffs. The present plaintiffs were desirous of doing that which would have made them secure, viz., of drawing on the underwriters, but Mitchell misleads them, and tells them to draw upon him. Then, does their drawing upon him in pursuance of that direction exonerate *the present defendants? *Russell v. Bangley*† shews that it has not that effect. The drawing of the bill shews merely that the plaintiffs were not unwilling to get their money in that way if they could; but then, if that bill be not paid, those originally liable to pay still continue liable. The present defendants were bound to pay Mitchell in cash; they have not paid him in cash, and therefore they are still liable to pay the amount to the plaintiffs. But then it is said, that for the sum of 228*l.* the defendants are entitled to credit. I agree with my Lord that there is no ground for making such a distinction, and that the defendants are not entitled to credit for that sum. If that sum had been paid specifically on account of the debt in question, in order to enable Mitchell to make a remittance to the plaintiffs, that might have varied the transaction with respect to that sum; but it was paid generally on account, and there are many other items in the account besides that of 835*l.* I am, therefore, of opinion that the company, never having paid the plaintiffs the amount of their demand in money, and never having done that which is equivalent to payment, are liable.

LITLEDALE, J. :

A total loss having happened, it was the duty of the underwriters to pay the amount to the assured; and supposing they ought to have paid them in money, and have not so done, the only question is, whether they have done that which is equivalent to payment in money? They have settled an account with *Mitchell, the broker, who was employed by the plaintiffs to conduct the transaction between them and the underwriters. The only question, therefore, is, whether Mitchell had authority from the plaintiffs to settle the account with the underwriters in the way in which he has done? There certainly was no express

† 4 B. & Ald. 395.

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authority given by the plaintiffs to Mitchell so to do; but that authority might be implied if there had been any course of dealing between the plaintiffs and the present underwriters and Mitchell, in which losses had been set off in this manner against a debt due from the broker to the underwriters. There certainly was no such course of dealing, because it appears that this was the first loss which the plaintiffs ever had. Then, if there was not any course of dealing from which such authority can be implied, is it to be inferred from the usage which is stated to have prevailed between the underwriters at Lloyd's and the brokers? The usage which prevailed at Lloyd's cannot be called in aid of the defendants in the present case, because they are not persons who effect insurances at Lloyd's. They are an Irish insurance company; and although they have agents in this country, that does not make them subject to the same rules as those are who effect policies at Lloyd's. Secondly, it cannot be supposed that the plaintiffs are particularly cognizant of what is done at Lloyd's, inasmuch as they reside not in London, but at Plymouth.

Then, if there was no express authority, and no course of dealing between the parties, or usage from which such authority can be implied, the only question is, whether any such authority can be collected from the letters stated in the case? It appears that Mitchell misled the plaintiffs as to the mode in which they were entitled to be paid. They tell him that was the first time they had had any loss, and that he must know better how to act than they do. It may be said that that gave him authority to act according to the best of his judgment. Mitchell afterwards leads them to suppose that the underwriters will pay the loss, not immediately, but at a certain time afterwards. They expect to be paid in money; and Mitchell tells them that the underwriters might have kept them out of a settlement for twelve months; that the custom was to wait one month, and then draw at three, but that they might value for half the amount at three months. The plaintiffs understood that they or Mitchell were to draw on the defendants; for they desire him to draw on the defendants, and to remit them, the plaintiffs, the drafts: but Mitchell tells them that the underwriters will not accept for losses, but that they, the plaintiffs, might draw on him at three

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months, subject to one month's discount; and they did then draw upon Mitchell. The effect of this correspondence is, that the plaintiffs, having confided to Mitchell to settle in the best manner he could, afterwards, on his representation, draw on him two drafts, which he accepted. It may be said, that by so doing the plaintiffs agreed to give credit to Mitchell, and to waive any right of action against the underwriters: but it appears to me in this case that that cannot be so, because the plaintiffs drew on Mitchell in consequence of his having represented that the underwriters would not accept for losses; and the plaintiffs fully expected that either the underwriters or Mitchell would take up the bills when they became due. I think, therefore, *that the plaintiffs did not by drawing the bill upon Mitchell abandon their right to sue the underwriters; because they drew upon him in consequence of his having represented that the money would not be paid by the underwriters. There has been a settlement between Mitchell and the underwriters, but the plaintiffs have nothing to do with it.

Then with regard to the other two sums, I entirely agree, for the reasons given, that they ought not to be deducted. The judgment of the Court must therefore be for the plaintiffs.

PARKE, J., having been concerned as counsel in the cause, gave no opinion.

Judgment for the plaintiffs.

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COLLINS AND OTHERS, ASSIGNEES OF F. ROBINE,
v. JONES.†

(10 Barn. & Cress. 777—784.)

Assumpsit by the assignees of R., a bankrupt, on a promissory note drawn by defendant, payable to G. or order, and by him indorsed to the bankrupt before the bankruptcy. It appeared that in October, 1825, G. applied to the bankrupt to discount the note, and took as part of the proceeds a bill of exchange, accepted by the bankrupt, payable to G.'s order. G. indorsed this bill for value to the defendant, and he got it discounted by H., who was the holder when it became due. A commission of bankrupt issued against R. on the 23rd December, and the bill

† Cited and applied in *McKinnon v. Armstrong* (a Scotch Appeal, 1877) 2 App. Cas. 531, 540.—R. C.

became due on the 24th, when it was presented and dishonoured. On the 26th H. received the amount from the defendant, and returned the bill to him: Held, that he had a right to set off the bill against the demand of the assignees on the promissory note.

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THIS was an action on a promissory note bearing date the 15th of October, 1825, for the sum of 300*l.*, drawn by the defendant in favour of one Gunn or order, payable four months after date, and by Gunn indorsed to the bankrupt. Plea, the general issue. The defendant paid 60*l.* into Court, and gave a notice of set-off of the bill of exchange for 177*l.* hereinafter mentioned, and also for money paid, money had and received, and money due on an account stated. At the trial before Lord Tenterden, Ch. J., at the London sittings after Trinity Term, 1827, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case:

In October, 1825, Gunn, being possessed of the promissory note for 300*l.*, applied to the bankrupt to discount that and sundry bills of exchange to the amount of between 600*l.* and 700*l.* To this the bankrupt agreed, but not being able to return cash for the whole sum, Gunn, in order to make up the deficiency, drew a bill on the bankrupt for 177*l.*, dated the 21st of October, at two months after date, payable to the order of Gunn, which the bankrupt accepted, and which Gunn accordingly received in part return for the said note and bills. This bill for 177*l.*, Gunn, a few days afterwards, indorsed to the defendant for value, and the defendant, on the 26th of October, paid it into his *bankers, Messrs. Hopkinsons, who on the 25th of November discounted it for him, and were the holders thereof when it became due. The commission against Robine bears date the 23rd of December, 1825. The bill for 177*l.* became due on Saturday, the 24th of that month, on which day it was duly presented for payment and dishonoured, and Messrs. Hopkinsons, on the 26th, received the amount of it from the defendant, and returned the bill to him. Prior to the issuing of the commission, the bankrupt deposited the note for 300*l.* with Messrs. Herries & Co. as his bankers, who held it when due, when it was dishonoured by the defendant, who upon proceedings being threatened by Messrs. Herries & Co., paid two instalments thereon amounting together to 61*l.* 14*s.* 8*d.*, which Messrs. Herries & Co. afterwards paid over, and also

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delivered up the note to the plaintiffs, who commenced the present action. The defendant, at the trial, claimed to be entitled to credit for or to set off the said bill for 177*l.* against the demand of the plaintiffs upon the note, and if he were so entitled the plaintiffs could not recover; the sum of 61*l.* 14*s.* 8*d.* paid on account of the note, together with the 65*l.* paid into Court, covering the difference of principal and interest between the two sums of 177*l.* and 300*l.* The question for the opinion of the Court was, whether the defendant was entitled to set off, or to credit for the amount of the said bill for 177*l.*

The case was argued at the sittings in banc before this Term, by *D. Pollock* for the plaintiffs, and *Hutchinson* for the defendant; but as all the points made are fully discussed in the judgment of the Court, it has been thought unnecessary to publish the arguments.

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BAYLEY, J. now delivered the judgment of the COURT :

This was an action on a promissory note for 300*l.* at four months after date, dated the 15th of October, 1825, and Jones, the defendant, was the maker, Gunn payee, and Robine, the bankrupt, indorsee. Robine discounted this note (in part) for Gunn; but, not being able to make up the amount in cash, Gunn drew upon Robine in favour of himself for 177*l.* at two months after date, dated the 21st of October, 1825, and that bill Gunn indorsed to the defendant. At that time, therefore, Jones held Robine's acceptance for 177*l.* due the 24th of December, 1825, and Robine held Jones's note for 300*l.* due the 18th of February, 1826. On the 26th of October Jones paid the bill for 177*l.* into his bankers, and they discounted it for him 25th of November. On the 23rd of December a commission issued against Robine; on the 24th his acceptance for 177*l.* was dishonoured; and on the 26th the defendant took it up. The defendant's note for 300*l.* was dishonoured, and Robine's assignees brought this action upon it; and the only question is, whether the defendant is entitled to set off, against the claim of the assignees, Robine's acceptance for 177*l.*? This depends upon the 6 Geo. IV. c. 16, s. 50. † That clause provides " that where there has been mutual credit

† Repealed: See now the Bankruptcy Act, 1863, s. 38.

given by the bankrupt and any other person, or, where there are mutual debts between the bankrupt and any other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and *no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made proveable against the estate of the bankrupt may also be set off in manner aforesaid against such estate; provided the person claiming the set-off had not, when such credit was given, notice of the act of bankruptcy." This clause is substituted for the 5 Geo. II. c. 30, s. 28, which provided, that where it should appear to the commissioners that there had been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the the commissioners, &c. should state the account between them, and one debt might be set against another, and what should appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, should be claimed or paid on either side respectively.

The 6 Geo. IV. c. 16, s. 50, therefore, contains in substance what the 5 Geo. II. c. 30, s. 28, did; but it does not make the act of bankruptcy the time at which the set-off is to cease, it makes all debts thereby made proveable items of set-off, and does not allow the set-off on the creditor's part if the credit was given by him after the act of bankruptcy, provided such creditor knew thereof at the time of giving credit.

The objection to allowing the set-off in this case is, that at the time of the commission the defendant was not the holder of this acceptance; it was in the hands of a third person, who might have proved it, and who, had he been a debtor to the bankrupt's estate, might have made it an item of set-off for his own debt; and it was *insisted, that the clause in question gives no right of set-off upon a negotiable security, unless to the person who was the holder of such security at the time the commission issued. It is conceded that the defendant might have set it off had he

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never parted with it, or if it had been returned to him before the commission issued, but that as it was out of his hands when the commission issued, and was not returned to him till afterwards, the right of set-off he would have had, had he not parted with the bill, was extinguished; and that, when he took up the bill, even though he did it because he was compelled to do so, he was not remitted to his prior state, and such right was not revived. It appears to us, however, that this is not the true construction of the statute. The difference in the phraseology of the statute, where mutual debts and mutual credits are the subject of consideration, is not immaterial; for in speaking of the former, mutual credits, it speaks in the past tense, as of a time prior to the commission, where there *has been* mutual credit; and in the case of debts, it speaks in the present tense, where there *are* mutual debts. The question then is, whether this is a case in which there has been, within the meaning of the 6 Geo. IV., mutual credit. *Hankey v. Smith*[†] assists us in judging what is to be understood as an item of credit. That case imports distinctly that an acceptance in the hands of an indorsee, not due until after the bankruptcy, is an item of that description. There the defendants discounted for Towgood & Co. (the holders) a bill accepted by Vaughans (the bankrupts), and the assignees of Vaughan & Co. having a demand upon the defendants for

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*goods sold, the question was, whether this acceptance of Vaughan & Co. constituted an item of credit, and the Court was clear that it did. Lord KENYON said, "mutual credit was constituted by taking the bill on the one hand, and selling the goods on the other;" and BULLER, J. said, "if a bill of exchange which is accepted is sent out into the world, credit is given to the acceptor by every person who takes the bill. Now that constituted the credit on one side in this case; then, on the other, credit was given to the defendants by the bankrupts for goods." That case establishes, that whoever takes an acceptance is to be considered within the 5 Geo. II. as giving a credit to the acceptor, and it will follow as a consequence, that whoever takes a note must be considered within the same statute, as giving a credit to the maker. Here then Robine, by discounting Jones's note, gave

† 3 T. R. 507.

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credit to Jones, and Jones, by taking Robine's acceptance, gave credit to Robine; and it is in consequence of thus having given credit, that Robine has a claim upon Jones upon the note, and that Jones has a claim against Robine upon the acceptance. There had, then, at the time of the bankruptcy, been mutual credit between these parties. It is true, that at the time of the bankruptcy, Jones was not the creditor upon this acceptance; his bankers were; but when the bill comes back to him, and he is forced to take it up, why is he not to stand in the same situation as if he had never parted with it, and to be remitted to his former rights? He is within the words of the statute; there has been a credit between him and the acceptor. And is he not within the spirit also? There were then mutual debts between the parties, and they had their origin in a mutual credit before the bankruptcy. Then why should one be forced *to pay what he owes in full, and take a dividend only for what is owing to him? It was insisted that this would open a door to fraud, by encouraging the debtors to a bankrupt's estate to endeavour to get into their possession bills of the bankrupt, which have passed through their hands; and that instead of being forced to pay them, they will press forward to do so as volunteers. There may be instances of such practices, but the possibility of fraud will not enable us to put a construction upon the statute different from what its words require. It is true the case *Ex parte Hale*[†] is against our opinion. There, as here, the bankrupt was the acceptor of a bill, the petitioner, *i.e.* the person claiming to make it an item of set-off, had indorsed: it was in the hands of the indorsee at the time of the bankruptcy; and there, as here, the petitioner had been obliged after the bankruptcy to take it up. Lord LOUGHBOROUGH held "that the petitioner might prove, but that he could not set off; that he could not by paying the bill put himself in a better situation than any other creditor; that there was no mutual credit; that though the acceptance constituted a debt due at the time of the bankruptcy, that debt was not due to the petitioner; and that, therefore, the set-off failed." That case, therefore, went upon the principle that it was not a case of mutual credit, in which respect it is at variance with

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† 3 Ves. 304. .

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Hankey v. Smith; and it was decided upon the 5 Geo. II. c. 30, the language of which is not so strong in favour of the right of set-off as that of the 6 Geo. IV. c. 16. This latter statute provides *de novo* that every debt and demand thereby made proveable against the estate of the bankrupt, may also be set off against *such estate, provided the person claiming the set-off had not, when he gave credit to such bankrupt, notice of an act of bankruptcy committed by him. And if that provision be confined, as perhaps it must, to such debts and demands as are thereby expressly made proveable, this is a case in which the defendant's claim is made proveable by this statute, for it falls expressly within the fifty-first section, and the defendant is a person entitled to prove as having given credit within the meaning of that clause.

The recent case of *Bolland v. Nash*† is an authority that a bill which forms an item of credit on one side, need not be in the hands of the person claiming it as an item of credit at the time of the bankruptcy; and we see no reason to doubt the propriety of that decision. We are, therefore, of opinion that the defendant had in this case a right to set off the acceptance for the 177*l.*, and, consequently, that a nonsuit should be entered.

Postea to the defendant.

1830.
May 14.

[826]

DUVERGIER v. FELLOWS.

ERROR FROM C. P. 5 Bing. 248.

(10 Barn. & Cress. 826—829; 1 Cl. & Fin. 39—48; S. C. 6 Bligh (N. S.) 87.)

Where a bond was given for payment of 10,000*l.*, with a condition that the money should be paid on the obligee's procuring subscriptions for 9,000 shares in a company to be formed of many persons, for the purpose of becoming assignees of a patent, and carrying on the patent process; and the patent contained a proviso, that it should be void if assigned to more than five persons: Held, that as the bond was subject to a condition for the performance of an illegal act, it was void.

DEBT on bond for 10,000*l.* The defendant craved oyer of the bond and condition, which was for payment of 10,000*l.* to the plaintiff in the event of his procuring subscribers for 9,000 shares in a company to be formed for becoming assignees of two patents in which the defendant was interested, and for carrying on the

† 32 R. R. 346 (8 B. & C. 105).

patent process; and then pleaded amongst other things, that the patents contained a proviso that they should be void if they were assigned to or in trust for more than five persons. Demurrer and joinder. The pleadings are set out at length in 5 Bing. 248, and on the argument of the demurrer the Court of Common Pleas gave judgment for the defendant. A writ of error was brought, and now the case was argued by

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Follett for the plaintiff in error :

There is nothing on the face of these pleas to render the bond void in reference to the proviso in the patents, nor is there any thing to shew that the intended company would be illegal, or at least that it was the intention of the parties to do such an illegal act as would render the bond void. The right of the plaintiff to sue is founded on the obligatory part of the bond. The condition is introduced for the benefit of the obligor, and there is a fallacy in supposing that the performance of that is a condition precedent to the right of the obligee to sue on the *bond. The defendant, in order to get rid of the action, must shew that the condition was illegal. Now the illegality relied on is, that the thing agreed to be done was in contravention of a proviso in the patent. But to make the bond void, the thing to be done must be shewn to be *malum prohibitum*, or *malum in se*. It is not sufficient to avoid the bond, that the condition is impossible or repugnant, or against some maxim of law, *Shep. Touch.* 372.

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(BAYLEY, J. : Monopolies are against the law, and are declared so to be by 21 Jac. I. c. 3. Patent rights are an exception out of the statute, but unless you keep within the patent you act illegally.)

Upon this record there is nothing to shew that the plaintiff was about to do any illegal act. If any thing of that kind was to be done, the defendant was the guilty person.

(LORD TENTERDEN, Ch. J. : The recital is, that the plaintiff consented and agreed to form the company.)

Unless it can be shewn that he knew the act to be illegal, he cannot be affected by it. Nothing of that kind appears in the

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bond and condition, nor are there any averments to shew that the plaintiff was to participate in any fraud by getting up a company to receive patents which could not lawfully be assigned to them. It should have been averred that the plaintiff knew the contents of the patents, which does not appear, nor was it necessary for him to have that knowledge in order to do that which it was incumbent on him to do. Suppose the plaintiff had actually succeeded in forming a company, and that then, when they came to receive the patents, it had been discovered that they could not be assigned to a company consisting of so many persons: that would not have furnished any answer to this action. *As the case now stands, there is nothing illegal in that which the plaintiff has done, nor is there any proof that the defendants intended to do any thing illegal. The defendants might lawfully assign the patents to any number, and so preclude themselves from objecting to the use of the patent principle, although the assignees might not acquire an exclusive right to the use of it.

[*828]

(BAYLEY, J.: The plea avers that the thing was to be done under pretence of carrying on the exclusive process.)

That pretence was not illegal, and if the condition was impossible, that fact must have been known to the obligors, and cannot be set up by them as an answer to the action.

Lloyd, contra, was stopped by the COURT.

LORD TENTERDEN, Ch. J.:

I am of opinion that the proviso in the patent has the effect of rendering the bond altogether void. The condition of the bond comes to this, certain persons being possessed of two patents, and desirous of assigning them to a large number of persons, and it being supposed that the plaintiff was connected with persons able to form such a company, it was agreed that if he succeeded in procuring subscriptions for 9,000 shares he should receive a certain sum of money. The plaintiff was to be active in promoting the scheme, and the persons who subscribed could not derive any benefit from it. Now it is said that the plaintiff

might be ignorant that such a consequence would follow ; but on this record we cannot find grounds for supposing that he was ignorant. If he was not cognisant of the terms of these particular *patents, he must be presumed to have known the general law of the land. By that all monopolies are illegal, but there is an exception in favour of patent rights, and if he knew that the monopoly proposed to be created could only be justified by the patents, he was bound to know their contents. We cannot presume that he was ignorant of that which it was his duty to know, and presuming that he knew the terms of the patents the bond is void, and the judgment of the Court below must be affirmed.

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[*829]

BAYLEY, J. :

The plaintiff was to receive the instalments on certain payments to be made by the owners of 9,000 shares. He was bound to know that these persons were doing a legal act.

LITLEDALE, J. :

I am of the same opinion. All monopolies are illegal unless allowed by a patent, which cannot be assigned at all unless power to that effect is given by the Crown. The plaintiff, therefore, was bound to see and ascertain that these patents might be assigned in the manner proposed.

PARKE, J. having been counsel in the cause gave no opinion.

Judgment affirmed.

[This judgment having been appealed to the House of Lords, the House, after hearing argument for the appellant, did not call for any argument from the respondents ; and the following judgment was pronounced by]

LORD TENTERDEN :

It appears to my judgment that this case is so plain that it will not be necessary for your Lordships to hear any further argument upon it ; and I am the more satisfied with my own opinion, as all the Judges who are now present agree in that opinion. They all agree that the judgments of the Courts below

1832.
July 3.
[1 Cl. & Fin.
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ought to be affirmed. Your lordships happen to enjoy this advantage, that six or seven Judges are now present, not one of whom was a Judge of either of the Courts below when the judgments appealed from were given, and consequently are not influenced by their previous opinions. This is an action of debt on bond, to which the defendant has pleaded three pleas, which, after argument on demurrer *in the Court of Common Pleas, and after Writ of Error in the Court of King's Bench, both Courts held sufficient to bar the action. His Lordship stated the nature of the patent, and of the condition thereto annexed. The condition is large, and is expressed in such a manner as to embrace almost every case that could be put of an assignment to any number of persons exceeding the number of five: "if the patentee or his agent should receive any sum of money from any number of persons exceeding five, for the purpose of dividing with them the benefits" of the patent, then it should be void. The plaintiff only set forth the obligatory part of the bond, not the condition; the defendant stated the condition; and it is to this effect, that the plaintiff shall procure 9,000 subscribers to form a company, to whom the defendant and two other persons shall part with the business they were then carrying on under the patent. It is therefore clear that, on the condition of the bond, this plaintiff was not entitled to any money unless he formed a company, and procured 9,000 shares to be taken, and unless he obtained payment of the first instalment. If the plaintiff, instead of confining himself to the statement of the obligatory part of the bond, had set out the condition of it, he would necessarily have shewn a breach of the condition of the patent, and would have alleged enough in his own declaration to shew that he could not maintain the action. But whether the matter comes before the Court on the plaintiff's declaration or on the defendant's plea, is a perfectly nugatory distinction. The fifth and sixth pleas aver the intention of the parties to vest the interest in more than five persons; the seventh plea introduces something else, and alleges that it was intended, at the time of making the bond, that the company *should consist of more than five persons; that they should act as a corporate body, and divide the benefit of the letters patent. The supposed illegality

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is put, therefore, on two grounds, first, that taken on the fifth and sixth pleas, that more than five persons were to form the company; and, secondly, that it was intended that the company should act as a corporate body. It is not necessary that both parts of the pleas should be proved. It is sufficient if either part is made out. If any one of the pleas is good, the judgment of the Court below must be affirmed. The condition of the letters patent is what I have mentioned; and the recital of the object of the bond is such, that the plaintiff cannot be entitled to the money he claims unless he has done that which is contrary to the condition of the letters patent, that is, unless he has obtained a greater number than five persons to become members of this company, and unless he has procured them to pay the first instalment on their shares. If they did pay that instalment, they would pay it for nothing, for they could not have the benefit of the patent. The object of the instrument on which the plaintiff seeks to recover was to invite the world to pay money for something from which they could not derive any advantage. But it is said that it is not shewn the plaintiff knew this to be the condition of the letters patent. I will not put the answer to that argument on the ground that every man must be presumed to know the effect of the instrument which he undertakes to carry into execution. If he was ignorant, it was his own fault; if he did not know, he ought to have known; but the fraud upon the public would be equal whether he did or not know that he was inviting men to do something which was illegal. The question then comes to this—can a man have the benefit of a bond by the condition of which *he undertakes to violate the law? It seems to me that it would not be according to the principles of the law of England, which is a law of reason and justice, to allow a man to maintain an action under such circumstances; it would be to hold out an encouragement to any man to induce others to become dupes, and to pay their money for that from which they could derive no advantage. Under these circumstances, I shall humbly advise your Lordships that the judgment of the Court below should be affirmed.

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Judgment affirmed.

[The judgment was affirmed, with costs.]

1890.
May 18.

[849]

DOE D. CALVERT v. REID.†

(10 Barn. & Cress. 849—857; S. C. 8 L. J. K. B. 328.)

Where the lessee of a public-house covenanted for himself, his executors, and assigns, with his lessors (brewers) to take all his beer of them or their successors in their said trade, and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c. to a distance of two miles, and there carried on the business of brewers: Held, that the trade of the lessors was thereby determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer.

EJECTMENT to recover a public-house and premises, in the parish of St. George, in the county of Middlesex. At the trial before Lord Tenterden, Ch. J., at the adjourned sittings after Trinity Term, 1828, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case: Mary Chapman and Anne Chapman being seised in fee of an estate in the parish of St. George, in the county of Middlesex, of which the premises in question formed part, by indenture dated the 18th day of February, 1803, and made between the said Mary Chapman and Anne Chapman of the one part, and John Phillips and Samuel Miall, therein described of the said parish of St. George, in the county of Middlesex, brewers and copartners, of the other part, (in consideration of the expense which the said John Phillips and Samuel Miall had been and would be at in erecting the buildings thereafter demised, and in finishing the same, and of the rent and covenants thereafter reserved and contained, and which on the part of the said John Phillips and Samuel Miall were to be paid and performed,) demised and leased to the said John Phillips and Samuel Miall the parcel of ground in the indenture described, with the messuage or tenement and buildings thereon erected, and which were the premises sought to be recovered in *this action, to hold unto the said John Phillips and Samuel Miall, their executors, administrators, and assigns, from Michaelmas Day then last past, for the term of ninety-eight years, at the yearly rent of 5*l.* 5*s.*, payable as therein was mentioned. John Phillips and Samuel Miall having finished the

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† Distinguished in *Clegg v. Hands* Co., '97, 1 Ch. 767, 66 L. J. Ch. 387, (1890) 44 Ch. D. 503, 517, 59 L. J. Ch. 76 L. T. 273, C. A.—R. C. 477; and see *White v. Southend Hotel*

said messuage and buildings, by an indenture made and executed the 18th day of January, 1805, by and between the said John Phillips and Samuel Miall of the one part, therein described as of the "Star" brewhouse, Wapping, and John Reid, the defendant, of the other part, in consideration of the sum of 500*l.* to them paid by the said John Reid, and also for and in consideration of the yearly rent, and of the covenants, provisoes, and agreements thereafter contained, and which, on the tenant or lessee's part, were to be paid, done, observed, performed, fulfilled and kept, demised, granted, leased, set and let unto the said John Reid the said parcel of ground, together with the said messuage or tenement and buildings so lately erected and built, and then standing and being upon the said ground, to hold unto the said John Reid from the feast day of St. Michael the Archangel, then last past, and which was in the year of our Lord 1804, for the term of ninety-six years, wanting ten days, at the yearly rent of 5*l.* 5*s.*, payable as therein was mentioned. And the said John Reid, for himself, his executors and administrators, did thereby covenant, promise, and agree, to and with the said John Phillips and Samuel Miall, their executors, administrators, and assigns, and to and with each and every of them, amongst other things, that he the said John Reid, his executors, administrators, or assigns, should and would at all times during the said term so thereby granted or demised, if a licence for *such purpose could be had or obtained, keep and use the said demised premises as a public or victualling house, and should and would from time to time, and at all times during the said term, purchase and take of and from the said John Phillips and Samuel Miall, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the porter, ale, and twopenny, or amber, or such of the said liquors respectively as by them should be brewed for sale, as should be sold or disposed of in or upon the said premises or any part thereof; provided and on condition nevertheless that they the said John Phillips and Samuel Miall, their executors, administrators, and assigns, or their successors as aforesaid, should furnish and supply him the said John Reid, his executors, administrators, under-tenants, or assigns, with such liquors or articles respectively of a good quality and in

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sufficient quantities, at fair and reasonable prices, with such allowances as are usual and customary on such occasions. And the last-mentioned lease contained a proviso for re-entry for breach of any of the covenants therein. At the time of the making of the last-mentioned lease the said John Phillips and Samuel Miall carried on trade as brewers in copartnership, and were landlords of a number of other public-houses, which they supplied with beer. Their trade was at that time carried on at a place called the "Star" brewhouse, at the New Crane, Gravel Lane, Ratcliffe Highway. The said John Reid entered into and was possessed of the demised premises under the lease of 1805, and by his under-tenants purchased of the said John Phillips and Samuel Miall the beer consumed upon the premises in question, until by an indenture bearing date the 1st day of November, 1805, and *made between John Phillips the elder of the first part, and the said John Phillips therein described as John Phillips the younger, and Samuel Miall of the second part, Thomas Taylor of the third part, and Thomas Stanley and John Cass of the fourth part, for the considerations therein mentioned, all and singular the premises in which the brewery of the said John Phillips and Samuel Miall was then carried on, and all the stock in trade, goods, effects, and things whatsoever belonging to the said trade, together with the said trade or business of the said John Phillips and Samuel Miall, were assigned, transferred, and set over to the said Thomas Stanley and John Cass; and by another indenture of the same date and made between the same parties, all the estate and interest of the said John Phillips and Samuel Miall of, in, and to all the public-houses of which they were landlords, and amongst others the public-house and premises sought to be recovered in this action, were assigned to the said Thomas Stanley and John Cass. By virtue of these two several assignments the said Thomas Stanley and John Cass entered upon and became possessed of or interested in all and singular the premises comprised therein respectively, and from the date thereof they carried on the business which had been before carried on by the said John Phillips and Samuel Miall; and the under-tenants of the defendant Reid, and the other customers of the old firm continued to deal with the said Thomas Stanley and

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John Cass, until, by articles of agreement made the 31st day of May, 1806, between the said Thomas Stanley and John Cass of the one part, and Charles Calvert, for and on behalf of Felix Calvert & Company of the other part, (reciting that the said Felix Calvert & Company had contracted and agreed *with the said Thomas Stanley and John Cass for the purchase of the said brewery plant, stock, and business, and for the messuages, tenements, or victualling houses belonging to the said trade, and also for the debts due and owing to the said trade), it was agreed that the said Thomas Stanley and John Cass should immediately upon the execution of the said articles of agreement deliver possession to the said Felix Calvert & Company of all and singular the said brewery plant, stock, and business, stables, messuages, and premises, and also all the leases of the victualling houses belonging to the said trade, and the several assignments thereof; and it was further thereby agreed that the said Thomas Stanley and John Cass should, upon the request of the said Felix Calvert & Company, well and sufficiently assign and set over unto Robert Calvert and Charles Calvert, two of the partners in the said house of Felix Calvert & Company, for the use of themselves and their partners, all and every the said brewery plant, stock, and business, messuages and premises, utensils and other things, with the aforesaid leases, assignments, and other instruments. The said Felix Calvert & Company took possession according to the terms of the said agreement, and afterwards (John Cass having died in the mean time), by an indenture bearing date the 9th day of January, 1816, and made between the said Thomas Stanley of the first part, George Cass the elder, Thomas Waller and Elizabeth Cass, executors of the said John Cass of the second part, and the said Robert Calvert and Charles Calvert of the third part, all the said brewery plant, stock, trade, and business, messuages and premises, and all the aforesaid leases, assignments, and other instruments, including, amongst others, the lease of the public-house *and premises now sought to be recovered were well and sufficiently assigned and set over to the said Robert Calvert and Charles Calvert, for the benefit of the said Felix Calvert & Company. Robert Calvert died in 1821.

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The firm of Felix Calvert & Company, after the said purchase,

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and after taking possession under the articles of agreement, removed the plant, &c., of the "Star" brewhouse, New Crane, to a brewery in Thames Street, and they have from thence hitherto carried on there the said trade, and the premises at New Crane have been converted to other purposes, and have not since been used as a brewery. The premises at the New Crane and the brewery in Thames Street are nearly two miles apart. The public-house sought to be recovered in this action is situate between them, but nearer by two thirds to the New Crane than to Thames Street. The brewery in Thames Street is at a distance sufficiently near and convenient for serving the said public-house with beer, and the occupiers thereof have regularly dealt with Felix Calvert & Company from the time they purchased as aforesaid, until the 19th of December, 1827, when the present occupier took possession. He has not purchased any beer of Felix Calvert & Company; but from the time of his taking possession he has purchased the porter sold upon the premises from Messrs. Hoar & Company, alleging that he has connections in that house.

Campbell for the lessors of the plaintiff:

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The question in this case is, whether the assignee of a lessor can recover against the assignee of the lessee, upon the breach of such a covenant as that now in question. Perhaps it may be said that the covenant to take beer from a *particular house is illegal, but the legality of such covenants has never heretofore been doubted, although they have several times been brought under the consideration of the Court: *Holcombe v. Hewson*,† *Jones v. Edney*,‡ *Cooper v. Twibill*.§ Then it will be contended that this covenant does not run with the land; but it clearly does so, for it touches and concerns the use and enjoyment of the land: *Sampson v. Easterby*.||

(LORD TENTERDEN, Ch. J.: Suppose the original lease were assigned to persons who had no interest in the brewery.)

At present there is a unity of title to the lease and the brewery,

† 11 R. R. 746 (2 Camp. 391).

‡ 13 R. R. 803 (3 Camp. 285).

§ 13 R. R. 803, n. (3 Camp. 286, n.)

|| 33 R. R. 239 (9 B. & C. 505).

the case is therefore within that of *Vyryan v. Arthur*.† This covenant is for something to be done on the demised premises, in which both parties have an interest; it is therefore stronger than the covenant to sing in a chapel (cited in *Vyryan v. Arthur*, from the Year Book, 43 Edw. III. s. 3), which was to be performed by a person who had no interest in it, and yet it was held to run with the land. The thing to be done in the present case is in the nature of a covenant to pay rent; for the rent actually reserved is doubtless fixed after taking into consideration the profit that the landlord would receive from the sale of the beer. In *Jourdain v. Wilson*; a covenant to supply water was held to run with the land. So also a covenant to insure, *Vernon v. Smith*,§ and a covenant to reside on the demised premises: *Tatem v. Chaplin*.|| In *Purefrey's* case ¶ the covenant to account, and in *The Mayor of Congleton v. Patteson* †† the covenant not to employ particular *persons, did not, in any way, concern or affect the thing demised. Now as to the question of trading, it is stated as a fact in the case, that the trade was assigned, and that the purchasers now carry on the said trade in another place; but sufficiently near for the convenient supply of the defendant's premises. If that removal puts an end to the covenant, it must be held that it would equally have been determined if the business had been removed to new premises merely across a street.

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Pollock, contra, was stopped by the Court.

LORD TENTERDEN, Ch. J. :

The covenant whereof the breach is insisted on as a forfeiture requires that the lessee should at all times during the term purchase and take of and from the lessors, their executors, administrators, or assigns, or their successors in their late or present trade as brewers, all the beer consumed on the premises. Now, whatever might have been the effect of that covenant if the trade had still been carried on by Phillips and Miall, or their assigns, it does not entitle the lessors of the plaintiff to recover

† 25 R. R. 437 (1 B. & C. 410).

‡ 23 R. R. 268 (4 B. & Ald. 266).

§ 24 R. R. 257 (5 B. & Ald. 1).

|| 3 R. R. 360 (2 H. Bl. 133).

¶ Moore, 243; Goldb. 120.

†† 10 East, 130.

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in this action ; for my opinion is, that the trade formerly carried on by Phillips and Miall has, by the events that have occurred, been absolutely put an end to and determined. It appears that Phillips and Miall assigned their premises and trade to Stanley and Cass, who again assigned to Calvert & Company, and these latter assignees removed the plant, &c. to a distance of two miles, and converted the old premises to other purposes. Now I cannot understand what is meant by the assignment of a trade generally ; and the assignment of a trade in a particular place means the good will of that trade. To that, I think, *the covenant in question must be held to apply, and Calvert & Company have put an end to the trade whereof the goodwill was assigned to them. The covenant, also, must therefore be at an end ; and the lessors of the plaintiff cannot recover in this ejectment.

BAYLEY, J. :

It is not necessary to say whether the covenant in question did or did not run with the land, but I think it would be very difficult to shew that *The Mayor of Congleton v. Patteson* does not govern this case. As to the other point, I am of opinion that the successors of any party in business are they who carry on the same business in the same place.

LITTLEDALE, J. :

I am of the same opinion. The lessors of the plaintiff cannot maintain this action, unless they are assignees not only of the premises but of the business of Phillips and Miall, which the facts shew not to be the case. If in *Vyryan v. Arthur* the mill had been removed to another place, I apprehend the covenant would not have applied ; and in *Richardson v. Capes*,† where the tenants and resiants within a manor were bound by custom to grind their malt at one or other of two mills, and the lord removed one, it was held that the custom was suspended, if not extinguished.

Postea to the defendant.‡

† 2 B. & C. 841.

‡ PARKE, J. having been counsel in the cause, gave no opinion.

DOE D. JACKSON *v.* HILEY.†

(10 Barn. & Cress. 885—894; S. C. 5 Man. & Ry. 706; 8 L. J. M. C. 105.)

1830.
May 22.

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The statute 59 Geo. III. c. 12, s. 17, vests in the churchwardens and overseers of the parish all buildings, lands, and hereditaments belonging to the parish, not merely where the profits thereof are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied; and that although the buildings, lands, and hereditaments had originally been vested in trustees for the benefit of the parish.

EJECTMENT to recover certain premises situate in the parish of St. Michael on the Mount in the city of Lincoln. The declaration contained several demises: one by William Jackson on the 2nd of November, 1826; a second demise on the same day, by Seth Brandham, churchwarden of the parish of St. Mark in the said city, Job Cartledge, churchwarden of the same parish, and Samuel Carr and Jonathan Davison overseers of the said parish of St. Mark; a third demise, on the same day, by the said parish officers, Seth Brandham, Samuel Carr, and Jonathan Davison (omitting Job Cartledge); a fourth demise on the same day by the aforesaid churchwardens (omitting the overseers); and a fifth demise, on the same day, by Seth Brandham, churchwarden aforesaid. At the trial before Holroyd, J., at the Lincolnshire Spring Assizes, 1827, the following facts were proved on the part of the lessors of the plaintiff: By indenture of lease, bearing date the 2nd day of January, 1786, Richard Gibson the elder, Luke Hutchinson, Charles Metham, John Jackson, Thomas Stones, John Wilkinson, Joseph Lund, Ralph Bowring, and Jonathan Glenn, described in the said lease to be inhabitants, parishioners, and feoffees of the parish lands and church lands of and belonging to the parish of St. Mark in the city of Lincoln, and Joseph Smith, churchwarden of the said parish, demised, granted, and leased to Robert Holmes, as well in consideration of the surrender of the former lease, as for divers other good causes and considerations therein described, as surviving executor *and trustee named in the last will and testament of John Lamb, late of the city of Lincoln, gentleman, deceased, two messuages or tenements, and ground thereto adjoining, situate in the said parish

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† See now also the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 14.—R. C.

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of St. Michael on the Mount, to hold the same to the said Robert Holmes and his assigns from the 26th day of December then last past, for and during the term of forty years thence next ensuing, upon such trusts nevertheless as were mentioned and expressed of and concerning the said premises in and by the last will and testament of the said John Lamb, deceased, paying yearly during the said term the rent of 30s. and two fat crammed capons, reserved by the said lease to the said Joseph Smith and his successors, churchwardens of the said parish of St. Mark for the time being. Part of the said tenements so demised to Robert Holmes were in the occupation of the defendant, and were sought to be recovered in the said action. He came into possession of the premises in 1815, and paid rent for them to Christmas, 1825, when the said term expired. The said Seth Brandham and Job Cartledge were sworn in as churchwardens for the parish of St. Mark on the 5th of April, 1826, and Samuel Carr and Jonathan Davison were overseers of the said parish for the year commencing at Easter, 1826. Thomas Sweeting was tenant of the said demised premises under the lessee, Holmes, and always paid the reserved rent for the said premises to the churchwardens of St. Mark for the time being; and the defendant, Roger Hiley, in the year 1823, paid his proportion of the said rent for that part of the said premises in his occupation, which was sought to be recovered in this action, to William Atkinson, churchwarden of the said parish of St. Mark, at the same time enquiring of the said Wm. Atkinson whether he was churchwarden *of the parish. There was a churchwardens' book and an overseers' book. The rents were always received by the churchwardens for the time being, and credit given for them in the churchwardens' book. Upon the production of this book, the disbursements stated in it were payments usually made by the churchwardens; and the receipts stated were various reserved out rents received by the churchwardens, a sum of 5*l.* 17*s.* 3*d.*, collected as a church-rate, and a sum of 6*l.* received from the overseers of the poor.

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In the latter part of April, 1826, possession of the premises, in the occupation of the defendant, was demanded in the name and on behalf of the said churchwardens and overseers of the parish of St. Mark, when the defendant refused to deliver up possession,

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denying that he held any property belonging to the said parish. All the lessors mentioned in the said lease died before the year 1826. John Jackson survived the rest, and died on the 27th of March, 1825. John Jackson, by his will, dated the 14th of February, 1825, previous to the death of one of the said lessors, devised all his lands, tenements, and hereditaments and premises to his brother William Jackson, who is not his heir-at-law, being of the half blood, who is one of the lessors of the plaintiff, his heirs, executors, administrators, and assigns, subject to the payment of his just debts. The jury found a verdict for the plaintiff, subject to the opinion of this Court on the facts above stated. If the Court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand. If the Court should be of opinion that the plaintiff was not entitled to recover, then a nonsuit was to be entered against him.

Amos for the plaintiff. * * *

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N. R. Clarke, contra. * * *

[890]

Cur. adv. vult.

LORD TENTERDEN, Ch. J. now delivered the judgment of the COURT :

[892]

We are of opinion that the lessors of the plaintiff are entitled to recover on that count of the declaration in which the demise is laid to have been by the churchwardens and overseers of the poor of the parish of St. Michael on the Mount, in the city of Lincoln. The premises in question were undoubtedly held for parish purposes. It was contended by the counsel for the lessors of the plaintiff, that the premises were vested in the parish officers by the 59 Geo. III. c. 12, s. 17. On the other hand it was insisted, on the part of the defendant, that the statute did not apply to this case for two reasons, first, because the persons in whom the legal *estate was vested were trustees only; and, secondly, because the profits of the premises sought to be recovered were applicable, not to the relief of the poor, but solely to those purposes for which the church rates were levied. As to the first of these objections we are of opinion that there is nothing in the Act of Parliament to prevent property held by

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trustees for the benefit of a parish vesting in the churchwardens and overseers, and it would be very inconvenient that it should be so. It is often difficult for persons who claim under an ancient trust (where the trustees are numerous), to ascertain who was the survivor of those trustees; and even if they succeed in ascertaining that fact, it will not be less difficult to shew who is the heir-at-law of that survivor. Property vested in trustees for the benefit of the parish seems equally within the mischief contemplated by the Legislature as well as property not so vested.

Upon the second point, whether the statute 59 Geo. III. c. 12, s. 17, extends to tenements, the profits of which are applicable to the purpose for which a church rate is levied, or is confined to those which are applicable merely to the relief of the poor, it is undoubtedly true that the primary object of the statute, (as appears from the title and preamble, and the early sections,) was the better and more effectual execution and amendment of the laws for the relief of the poor. The seventeenth section goes much further. It enacts, that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority, and for any of the purposes of that Act, shall be conveyed, demised, and assured to the churchwardens and overseers of the poor of every such parish respectively, *and their successors, in trust for the parish; and such churchwardens and overseers of the poor, and their successors, shall and may, and they are hereby empowered to accept, take, and hold in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands, and hereditaments, and also all other buildings, lands, and hereditaments belonging to such parish. The latter words are most general, and comprehend all buildings, lands, and hereditaments belonging to the parish; and although the poor may be the primary object of the statute, we think the safest course for us to adopt, in construing this section of the Act, will be to give full effect to that generality of expression, there being nothing to shew that lands or buildings which are applied in aid of the church rate do not require the aid of this provision as well as those which are applied to the relief of the

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poor. In both cases there is the same difficulty of finding out in whom the legal estate in the premises belonging to the parish is vested, and that was the mischief which, by the seventeenth section, the Legislature intended to remedy; and we can see no reason to doubt that the operation of that clause was intended to be co-extensive with the mischief. The *postea* must, therefore, be delivered to the plaintiff.

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Postea to the plaintiff.

THE BRITISH LINEN COMPANY v. GEORGE
HARLEY DRUMMOND, ESQUIRE.†

1830.

[903]

(10 Barn. & Cress. 903—912; S. C. 9 L. J. K. B. 213.)

In an action of debt, it was averred, that before the making of the instrument and obligation thereafter mentioned, the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein: and that by a certain instrument and obligation in writing, (which was set out,) the said A. B. and the defendant became bound, and obliged themselves conjointly and severally to pay to the plaintiffs the sum of 400*l.* sterling. It was then averred, that by the law of Scotland at the time of making the instrument and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the plaintiffs against the defendant upon the instrument, and the cause and right of action accruing thereon, had not yet elapsed, that is to say, by virtue of the said law, the plaintiffs had the right and privilege of suing and bringing any action thereon, at any time within forty years from the time of making and signing the bond. Plea, that the cause of action did not accrue within six years: Held, upon demurrer, that the plea was an answer to the action.

DECLARATION stated that before and at the time of making the instrument and obligation thereafter mentioned, the British Linen Company carried on business in Scotland, and one James M'Culloch and the defendant were resident and domiciled therein, to wit, at, &c., and thereupon on the 18th September, 1823, in Scotland, to wit, at, &c., by a certain instrument and obligation *in writing there to wit, in Scotland aforesaid, made and signed by the defendant as thereafter mentioned and expressed, and which said last-mentioned instrument and obligation in writing the Company brought into Court, the date whereof was the day and year last aforesaid. The instrument was then set forth, and

[*904]

† Cited and applied in judgment of Lord BROUGHAM in *Don v. Lippmann* (1837) 5 Cl. & Fin. 1, 11.—R. C.

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after reciting that a court of directors of the company had agreed to allow James M'Culloch and the defendant a credit upon an account current, to be kept in the books of the company in the name of James M'Culloch, to the amount of 400*l.* sterling; upon their granting the last-mentioned obligation, therefore, the said James M'Culloch and defendant thereby bound and obliged themselves conjointly and severally, their heirs, executors, and successors whatsoever to content and pay the company the said sum of 400*l.* sterling, or such part or parts thereof as the said James M'Culloch should draw out value for, or be due to the company, by orders or drafts on the company, &c. &c. The declaration, after stating the mode in which the bond was executed, averred, that by virtue of the law and customs of Scotland aforesaid, then and at the time of making such instrument, and thence hitherto in force, the time for bringing any suit or instituting any legal proceeding by the company against the defendant upon and in respect of the said last-mentioned instrument, and the cause and right of action accruing thereon had not yet elapsed, that is to say, by virtue of the said law and customs, the said company had the right and privilege of suing and bringing any action thereon at any time within divers, to wit, forty years from the time of making and signing the same as aforesaid. It was then stated that the company, by virtue of the instrument and obligation last aforesaid, at the request

[*905] *of the defendant, gave and allowed credit to the said James M'Culloch and the defendant, upon an account current, kept in the books of the company in the name of the said James M'Culloch, to the amount of 400*l.*, and that that credit had expired, and that there was due to the company 228*l.* as a balance; that M'Culloch died insolvent; that in his lifetime he had wholly refused and neglected to pay the said sum of 228*l.* or any part thereof, or any interest thereon, although payment was demanded in his lifetime, of which the defendant had notice, whereby an action accrued, &c. Plea, that the supposed causes of action did not, nor did either of them, accrue to the company at any time within six years before the exhibiting of the bill of the company against the defendant in manner and form, &c. General demurrer and joinder.

Campbell in support of the demurrer :

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The plea is bad. It is founded on stat. 21 Jac. I. c. 16, s. 8, which statute does not apply to the instrument set out in the declaration, the same having been framed in Scotland, (which for the purpose of this case must be considered a foreign country,) and by the law of that country the action may still be maintained. The decisions of both English and Scotch Courts shew that the construction of personal contracts depends on the *lex loci contractus*. Therefore if this be a personal contract plaintiff is entitled to judgment, for according to the law of Scotland, he would not be barred by the effluxion of time. * * *

Undoubtedly the foreign jurists appear at first sight against the plaintiff; but they have not been recognised here, and appear to have been rejected by the House of Lords.

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Huber in his *Prælectiones Juris Civilis*, part ii. lib. i. tit. iii. (De Conflictu Legum), s. 7, says, “Præterea dubitatum est, si ex contractu alibi celebrato, apud nos actio instituatur, atque in ista actione danda vel neganda, aliud juris apud nos, aliud esset ubi contractus erat initus, utrius loci jus servandum foret? Exemplum: Frisius in Hollandia debitor factus ex causa mercium particulatim venditarum, convenitur in Frisia post biennium. Opponit præscriptionem apud nos in ejusmodi debitis receptam; creditor replicat in Hollandia ubi contractus initus erat ejusmodi præscriptionem non esse receptam, proinde sibi non obstare in hac causa. Sed aliter judicatum est, semel in causa Justi Blenkenfeldt contra G. Y. iterum inter Johannem Joneliin Sartorem Principis Arausionensis, contra N. B. utraque ante magnas ferias 1680. Eadem ratione, si quis debitorem in Frisia conveniat ex instrumento coram Scabinis in Hollandia celebrato, quod ibi, non jure communi, habet paratam executionem, id heic eam vim non habebit, sed opus erit causæ cognitione et sententia. Ratio hæc est, quod præscriptio et executio non pertinent *ad valorem contractus, sed ad tempus et modum actionis instituendæ, quæ per se quasi contractum separatumque negotium constituit, adeoque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo, ubi agitur, etsi de negotio alibi celebrato, spectetur, ut docet Sandius, lib. i. tit. xii. def. 5, ubi tradit, etiam in executione sententiæ alibi latæ, servari jus loci in quo fit executio, non ubi

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res judicata est." It does not appear, however, that the Frisian who went and bought goods in Holland was domiciled there.

Again, John Voet, in lib. xlv. tit. iii. s. 12, says, "Si præscriptioni implendæ alia præfinita sint tempora in loco domicilii actoris, alia in loco ubi reus domicilium fovet, spectandum videtur tempus, quod obtinet ex statuto loci, in quo reus commoratur." Although, however, the *lex domicilii* is to be regarded, yet it is not adverted to where the domicile was when the contract was entered into. And here both the parties were domiciled in the same country.

[911]

Several cases on the subject have been decided in the Courts of Scotland. * * * In *The York Buildings Company v. Cheswell*, February, 1792,† it was decided by the Court of Session, that the Scottish prescription‡ was not pleadable by debtors domiciled in England.§ On the whole, therefore, it appears that the *lex loci contractus* must prevail, because the contracting parties knew the law, and must be supposed to embody it in their contract.

[*912]

(BAYLEY, J.: There is one *point which you do not touch yet. Should not all this matter respecting the Scotch law be stated in the replication, and not in the declaration? Would it be in issue on *nil debet*, time and place not being material, unless made so by plea? This ought to have come in the replication.)

† Morrison's Dict. of Decis. 4528.

‡ The argument here refers to the *negative prescription*, i.e. the loss or forfeiture of a right by non-exercise, according to the law of Scotland.—R. C.

§ It was in that case observed on the Bench: "This is in all respects an English company domiciled in England, and by their charter of erection fixed down to a residence there; so that in every instance of their being sued in this country, citation at the pier and shore of Leith was necessary. If, instead of being thus permanent in England, they had changed their place of residence to Scotland, and continued there during the forty years, it might have been

competent to them to plead our prescription, notwithstanding that England was the *locus contractus*. For it is the *lex domicilii debitoris* which in this matter is the governing rule; and that law admits not this prescription. It is clear, that in England, actions on those bonds would lie against the company. They are not, therefore, in the words of the statute of 1469, 'obligations of nane avail.' The debtors surely would not be entitled to say so for having brought their effects over the border. In all cases in which the Court has sustained our prescriptions against English debts, the debtors were considered as having acquired a residence in this country."

That would have done no harm; but it is all part of the contract.

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LORD TENTERDEN, Ch. J.:

Upon the general principle it seems to me, that if the plaintiffs were to amend, they would still have this great difficulty to contend with, that, according to the authority of Huber and Voet, the party suing, and seeking to avail himself of the law of a particular country, must take that law as he finds it. Now, by the law of this country, such an action as the present cannot be maintained after the expiration of six years from the making of the contract. The case of *Delvalle v. The York Buildings Company*[†] is the only authority which creates the smallest doubt in my mind.

White:

The Statute of Limitations in Scotland applies only to bonds made in Scotland; and the bond in that case was made in England.

Leave was given to *Campbell* to amend; but in Michaelmas Term, 1880, he said he had carefully considered the subject, and had come to the conclusion that, even if he made the proposed amendment, there must be judgment against the plaintiffs, and he therefore declined to amend; and thereupon the Court gave judgment for the defendant.

Judgment for the defendant.

WOOD v. SMITH.

(5 Man. & Ry. 124; S. C. 8 L. J. K. B. 50; S. C. at N. P. 4 Car. & P. 45.)

"I believe the mare to be sound, but I will not warrant her."

The purchaser may declare in *assumpsit*, as upon a warranty that the mare is sound to the best of the vendor's knowledge.

ASSUMPSIT. The declaration stated, that in consideration the plaintiff would buy a mare of the defendant, the defendant undertook and faithfully promised the plaintiff that the mare was sound to the best of his knowledge. Breach, that at the time

[†] Morrison's Dict. of Decis. 4325.

1829.
Nov. 11.
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of the promise the mare was unsound, as the defendant then and there well knew. At the trial before Lord Tenterden, Ch. J. at the sittings at Westminster after last Trinity Term, it appeared that when the plaintiff sold the mare, he said, "I believe the mare to be sound, but I will not warrant her." The unsoundness being proved, it was objected, on the part of the defendant, that the action should have been in tort upon the deceit. The learned Judge was of opinion that the representation made at the time of sale was part of the contract, and directed a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit.

Gurney now moved accordingly :

The contract is misdescribed in the declaration, which does not notice the qualifying words, "but I will not warrant her." This is a case in which it was peculiarly proper to bring tort, and not assumpsit : *Williamson v. Allison*,† *Dobell v. Stevens*.‡

LORD TENTERDEN, Ch. J. :

No doubt the action might have been in tort.

PARKE, J. :

The words omitted do not qualify the contract.

BAYLEY, J. :

The defendant means to say I will not give a general warranty.

Rule refused.

† 2 East, 446.

‡ 27 R. R. 441 (3 B. & C. 623, 5 Dowl. & Ry. 490).

HARPER v. HAYTON.

(5 Man. & Ry. 305—313; S. C. 8 L. J. M. C. 129.)

1829.
Dec. 12:

[305]

Where upon a recognizance forfeited at Quarter Sessions, the sheriff has levied part of the penalty, and has the defendant in execution for the residue, the Sessions have jurisdiction over the whole recognizance, and if the sheriff has notice that they have discharged the defendant wholly therefrom, before the money levied had been paid over to the Treasury, an action for money had and received lies against the sheriff for the amount.

Whether any notice of the order, or any demand of repayment is necessary, *quære*.

ASSUMPSIT for money had and received against the late sheriff of the county of Hereford. At the trial before Park, J. at the Hereford Spring Assizes, 1829, the following facts appeared :

The plaintiff having entered into a recognizance in 40*l.* conditioned for her appearance at the Quarter Sessions, and having made default, the recognizance was forfeited and estreated. A copy of the estreat roll, including the estreat of the plaintiff's recognizance, being sent to the defendant, as sheriff, with the writ of *distringas*, *fieri facias*, and *capias*, as required by the second section of 8 Geo. IV. *c. 46, the defendant levied to the amount of 1*l.* 8*s.* 7*d.*, and took the plaintiff in execution for the residue. She was afterwards discharged from her recognizance by the Court of Quarter Sessions, under the sixth section of the Act. The defendant had not, previously to the discharge of the plaintiff, passed his accounts at the Exchequer, but he had returned the 1*l.* 8*s.* 7*d.* as levied under the estreat and writ. The learned Judge, upon being pressed with the authority *of *Haynes v. Hayton*† was of opinion that the Court of Quarter Sessions had no authority over the recognizance, *and nonsuited the plaintiff. In last Easter Term a rule *nisi* was obtained by *Maule* for a new trial; against which

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[*308]

Taunton, now shewed cause :

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The plaintiff must recover by force of his own title. It is no matter whether the *sheriff wrongfully retained the money, unless he also wrongfully received it, or retained it to his *own use*. In *Haynes v. Hayton*, the plaintiff was not committed and did not

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give the security. Here, the plaintiff did not pay the whole: 1*l.* 8*s.* 7*d.* only was paid instead of 20*l.*, and the party was committed for non-payment of the residue. It is submitted that though the magistrates had jurisdiction, it was a limited jurisdiction, and they had no power to order the discharge of the plaintiff from the whole recognizance. As soon as the 1*l.* 8*s.* 7*d.* was paid, it was money had and received to the use of the Crown, and ought to be paid over to the Treasury. The magistrates have exceeded their authority in ordering a general discharge, their order, according to *Haynes v. Hayton*, was void. But supposing the Court of Quarter Sessions *had* power to discharge the plaintiff from the whole of the recognizance, even then the case does not become the same as if no recognizance had ever been executed, and no levy made. If so, the imprisonment would be a wrongful act, for which there is no jurisdiction.

The sheriff must, at all events, withhold the money, subject to the direction of the Treasury. The course for the plaintiff to take should be either to present a memorial or a petition to the King.
[*311] If this action is maintainable, the *plaintiff might have sued the sheriff the very moment that the recognizance was discharged.

(BAYLEY, J. : Must not the sheriff be served with an order ? The sheriff cannot be accountable to the plaintiff until he has had notice of the discharge from the recognizance. That point, however, does not arise here ; the sheriff is not answerable to the Crown if the recognizance is *discharged* by a competent authority.)

There is no proof of notice on the sheriff.

(BAYLEY, J. : In this case the sheriff must have had notice.)

It is not shewn that the defendant was authorized by the Treasury to return the money to the plaintiff ; or that he was actually discharged from the *estreat*.

(BAYLEY, J. : The statute does that.

PARKE, J. : After the order, the sheriff was not answerable to the Crown.)

Maule, contra :

The justices had jurisdiction to make the order for discharging the plaintiff from the recognizance, and *money had and received* is the proper remedy.

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HAYTON.

(PARKE, J. : The justices have an absolute discretion. It was competent to them to have ordered the money to remain in the hands of the sheriff to the use of the Crown.)

The liability of the sheriff to the Crown arises from the estreat, and that being doubtful, it stands as if no forfeiture had been incurred and no estreat made. (Here he was stopped by the COURT.)

BAYLEY, J., after adverting to the provisions of 3 Geo. IV. c. 46, sects. 2, 5, and 6, proceeded as follows :

In *Haynes v. Hayton* the Court decided, that, except in the two cases of commitment and security, the justices at Sessions had no jurisdiction. The authority given is not a general but a limited authority. In this case the party has been *committed*. The Sessions had, therefore, no doubt, *some* jurisdiction. We must go on further and see whether any limitation is imposed. It is quite clear that the justices were entitled to take something into their consideration. It would be singular if the party were bound to seek his *discharge partly at the Sessions and partly at the Treasury ; the statute uses the words " paid or to be paid." They may therefore discharge *money paid*. But they have jurisdiction over the whole matter. If the sheriff continued to be accountable to the Treasury, he would clearly not be bound to pay the plaintiff. But the Act says " that the Court of Quarter Sessions shall at its discretion be empowered to order the whole of the forfeited recognizance, or sum of money paid or to be paid in lieu or satisfaction thereof, or any part thereof, and such order shall be in the form or to the effect of the schedule marked (C) to this Act annexed." Then the order framed according to the form given by the Act distinctly says that he is to be discharged as to the whole. Then the recognizance being out of the way the sheriff is not accountable to the Treasury, but to the party. No tender

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having been pleaded, it is immaterial to consider whether the defendant was authorized to make a tender.

LITLEDALE, J. :

There does not seem to be any good reason why there should not be jurisdiction where the money has been paid. Here, however, the party is brought before the Sessions, and therefore that Court has jurisdiction. The Sessions are authorized not only to discharge the whole recognizance, but by express words that Court has jurisdiction over any part paid or not paid. The question is, whether the defendant is to pay to the Treasury or to the plaintiff, the defendant having levied part of the money, and taken the party in execution for the remainder. The sheriff having levied part, would not make his payments into the Exchequer by piecemeal, but would wait to see what was done as to the residue.† The Sessions might not have discharged the plaintiff, who then would have been bound to pay the remainder. Here, the sheriff is forbidden to pay into the Treasury.

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Payment was demanded of the sheriff, though I doubt whether any demand was necessary. It was the duty of the defendant to know what was doing at the Sessions ; knowing that an order *might* be made, it was the defendant's duty to ascertain whether any order *was* made.

PARKE, J. :

I am of the same opinion. The plaintiff was brought before the Sessions, and that Court had jurisdiction to discharge in whole or in part. The defendant was originally bound to account to the Court for the sum which he had levied. But from this he was discharged by the order. It is not necessary to say whether any notice or demand was necessary.

Rule absolute.

† But if the sheriff had to pass his accounts before any further sum was obtained by the incarceration of the

defendant, he would be bound to account for so much as he had received.

REX v. THOMAS SOUTHWOOD.

(5 Man. & Ry. 414—418.)

1827.

[414]

A. & B., joint tenants of a copyhold, make partition by parol without the assent of the lord, and afterwards occupy in severalty. A surrenders to C. by general words: Held, that C. was not entitled to be admitted to the parcels occupied by A. in severalty.†

A CUSTOMARY estate,‡ parcel of the manor of Taunton-Deane§ in the county of Somerset, was surrendered to the use of Richard Staple and Thomas Valentine Staple, their heirs and assigns for ever, according to the custom of the manor. Richard Staple paid more than one half of the purchase-money. This estate was purchased by the Staples in pursuance of a parol agreement between them, that Thomas V. Staple should have such part as was situated on one side of the river (which intersected the estate,) and lay contiguous to his own lands, Richard *Staple taking the other part of the estate, which was more than one half thereof, and which lay contiguous to his own lands. The respective parts were accordingly entered upon, and occupied and enjoyed in severalty. Richard Staple occupied his part of the estate until his death, and exercised acts of ownership on the same as the sole proprietor thereof. The rates and taxes were divided between the purchasers according to the parts of the estate which they so respectively occupied and enjoyed.

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In this state of things Richard Staple made a dormant surrender|| of all his messuages, &c., within the manor, to the

† This case was argued in Trinity Term, 1827.

‡ The property was described in the affidavits on which the rule was obtained as a *customary freehold*; but it was admitted that this estate, even if properly so designated, belonged to that class of customary freeholds which are within and parcel of the manor, and of which the *freehold* is in the lord. See the distinction between this species of tenure and freehold in ancient demesne, Manning's Exch. Practice, 2nd ed., 359, 360, 361.

§ As to the peculiar tenures in this

manor, see *ibid.* 364, n. (r).

|| A *dormant* surrender in this manor, is a surrender made "for the purpose of settling his land upon any person or persons whom the surrenderor intends to make his heir or heirs, or, to charge the same with any sum or sums of money, or, for the performance of his last will and testament—such surrenders to be published and take effect after the death of the surrenderor, he leaving in himself the present possession and interest of the lands so surrendered. In every of which surrenders there must be a condition inserted, by which a power

[*415, n.]

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use and behoof of Lee, his heirs and assigns, for ever, according to the custom of the said manor; to be holden upon condition that Lee, his heirs or assigns, should pay all bequests contained in the last will and testament of the said Richard Staple, which on the part and behalf of Lee, his heirs or assigns, out of, for, or in respect of the premises therein mentioned, were to be paid, performed, fulfilled, and executed; and upon a further condition that if Richard Staple should happen to die before Lady Day, 1892, and should not in the meantime dispose of or surrender the premises, or revoke that surrender, then such last-mentioned surrender was to be and remain in full force and virtue. After the dormant surrender, Richard Staple made his will, and thereby gave all his messuages and parcels of the manor, &c. to certain trustees, their heirs, &c. upon certain trusts therein mentioned.

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Within the time limited by the custom for "making entries" or being admitted tenant to the lord, Lee applied to W. Kinglake, gent., clerk of the Castle of Taunton, and steward or agent of Thomas Southwood, Esq., lord of the said manor, and requested Kinglake to allow him to make the usual entries† in respect of a certain messuage, &c., which had been so occupied and enjoyed by Richard Staple in severalty, and also to admit him tenant to the same pursuant to such dormant surrender. Kinglake refusing so to do, a notice‡ was addressed to Southwood and Kinglake, and served on Kinglake, stating the surrender. Lee afterwards attended at the law-day court, (or court-leet,) of the manor, in order to make the usual entry or entries, and gave notice

is reserved to the surrenderor to revoke, frustrate, and make void the same surrender within the space of seven or eight years, according to the custom of the manor." — Ancient Customs of the Manor of Taunton-Deane (Taunton, 1821), 9th Custom.

† As to which, *vide post*.

‡ "I, the undersigned Richard Lee, the dormant surrenderee named in the dormant surrender of Richard Staple, late of Corfe, in the county of Somerset, yeoman, deceased, do hereby, as such dormant surrenderee, request and require you immediately to allow

me to make the usual entries in respect of the undermentioned messuage or site of a house, closes of land, and hereditaments, which belonged to and were in the possession of the said Richard Staple at the time of his death, and *parts* of an estate lately belonging to John Dyer, situated in the said parish of Corfe, and parcels of the manor of Taunton-Deane, and also to admit me tenant of the same, pursuant to such dormant surrender. [Here follow the parcels.] Dated the 23rd April, 1827.

"(Signed) RICHARD LEE."

of his being there for that purpose; but neither Kinglake nor the lord, who was then present, would then or at any time since make or allow such entries to be made, or admit Lee as such tenant.

REX
v.
SOUTHWOOD.

Bayly obtained a rule calling upon the lord and steward to shew cause why a writ of *mandamus* should not issue, commanding them or one of them to admit Lee tenant to the said customary lands; against which,

Manning shewed cause:

Copyholders cannot make partition without the licence of the lord, *Fuller v. Terry*;† and even if copyholders could make a valid partition, to *endure whilst the existing grant continued, it would be unreasonable to require the lord to make re-grants in severalty, as the lord would thereby lessen his remedy for his rent. At present every part of the copyhold is liable for the whole rent; whereas after a severance assented to by the lord, he could distrain only *pro-particulâ illâ*. Besides which, if this *mandamus* were to issue, by whom is the rent to be apportioned between Lee and the surviving brother? It is not disputed that the effect of the dormant surrender was to sever the joint-tenancy, and create a tenancy in common; and the lord has always been ready to admit Lee to an undivided moiety of the whole tenement. The notice confounds the legal severance of the joint-tenancy by the dormant surrender, and the actual severance of the parcels by an occupation in severalty of distinct parts of the customary lands.

[*417]

Bayly, in support of his rule, cited *Snag v. Fox*,‡ in which a copyholder aliened part of his copyhold to one and part to another, and retained part in his own hands, and no question was made as to the right of the copyholder so to deal with his estate; and the only doubt was, whether the lord was entitled to more than one heriot.§

† Hargr. Co. Litt. 59 a, note 395.

‡ Palm. 342; S. C. 2 Roll. Abr. 514; 20 Vin. Abr. 243.

§ Where the lord has become entitled to several heriots by the severance of a heriotable tenement,

and the different parts of the severed tenement are afterwards re-united in the same tenant, the lord is only entitled to one heriot: *Holloway v. Berkeley*, 30 R. R. 228 (6 B. & C. 2, 9 Dowl. & Ry. 83), unless during the

REX

(BAYLEY, J. : There the lord assented to the alienation.)

v.

SOUTHWOOD. He also referred to *Wase v. Pretty*.†

LORD TENTERDEN, Ch. J. :

Two persons are joint tenants of the copyhold. They occupy in severalty, but their estate is joint. One of the joint-tenants surrenders to the lord by words capable of passing the whole.

[*418] That *severs the joint-tenancy. The surrender can only operate upon that which the party has, and can pass.

BAYLEY and HOLROYD, JJ. concurred.

LITTLEDALE, J. :

The only course which Lee can adopt seems to be to procure the surviving tenant in common to join in a surrender of the whole, and then to apply to the lord to grant out the parcels in severalty.

Rule discharged.

Manning applied for the costs of the motion, which the COURT refused, on the ground that it did not appear by affidavit, that when Lee applied to be admitted in severalty any offer was made to admit him to an undivided moiety.

1829.

April 25.

WILSON v. BAGSHAW.

(5 Man. & Ry. 448—452.)

[448]

A plea that A. being seised of Whiteacre and Blackacre, always used a way over Whiteacre to Blackacre, and afterwards conveyed Blackacre, "together with all ways and appurtenances whatsoever," to B., is not a sufficient justification of an entry into Whiteacre by B.

If at the time of the conveyance A. had no access to Blackacre by a way appurtenant *in alieno solo*, that circumstance should be alleged.

Or it should be pleaded as a *grant* of the way.

TRESPASS for breaking and entering a close called Burr's Hill, at Great Hucklow, in the county of Derby, and depasturing cattle there. Pleas: first, the general issue; secondly, that long before the plaintiff had anything in the said close in which, &c., to wit,

severance the lord has, by perception of the several heriots from the respective tenants, obtained actual *seisin* of

such new heriots. *Manning's Exch. Prac.*, 2nd ed., 341.

† *Winch*, Rep. 3; *Hetley*, 150.

WILSON
v.
BAGSHAW.
[*449]

on the 10th April, 1807, one John Remington, and one Barnard John Wake, at one and the same time, were seised in their demesne as of fee of and in a certain close, called Black *Titch, whereof the said close in which, &c. then was parcel, and of and in certain other closes called Loure Greaves and Fox Burrs, and the said J. R., and B. J. W., by themselves, their farmers and tenants, occupiers of the said last-mentioned close, during all the time they were seised of the said several closes as hereinbefore-mentioned, and until and at the time of the alienation thereof by the said J. R., and B. J. W., as hereinafter-mentioned, used and enjoyed a certain way for themselves and their servants to go, return, pass and repass on foot, and with cattle, carts, carriages, and waggons respectively, from and out of a certain common highway, into, through, over, and along the said close called Loure Greaves, unto, into, over, and along the said close called Black Titch, unto, into, through, over, and along the said close in which &c., so being part and parcel thereof as aforesaid, unto and into the said close called Fox Burrs, and so back again from the said close called Fox Burrs, in and along the said way, unto, and into the said common highway, every year and at all times of the year, for the more convenient use and occupation of the said close called Fox Burrs. And the defendants further say, that the said J. R. and B. J. W., being so seised of the said several closes as hereinbefore-mentioned, and so using, having, and enjoying the said way in this plea mentioned, afterwards, to wit, on &c., at &c., enfeoffed defendant Bartholomew of the said close called Fox Burrs, together with all ways and appurtenances whatsoever to the said last-mentioned close belonging, *habendum* unto defendant Bartholomew, his heirs and assigns; by virtue of which feoffment defendant Bartholomew afterwards, to wit, on &c., at &c., became and was seised of the said close called Fox Burrs, with the appurtenances, as hereinbefore-mentioned, in his demesne as of fee, and became and was entitled to such way, as in this plea mentioned, there being before and at the time of the said feoffment no other way to the said close called the Fox Burrs from the said common and public highway, and which *last-mentioned way hath from time to time since been used accordingly by the defendant Bartholomew and his tenants,

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v.
BAGSHAW.

occupiers of the said last-mentioned close. And the defendants, in fact, say that the defendant Bartholomew, being so seised of the said last-mentioned close and being so entitled to the said way as aforesaid, afterwards, and at the said several times when &c. having occasion &c.

The third plea, instead of claiming the way at all times of the year, stated the right to be “at certain periods of the year, sc. at those periods when the close called Black Titch was not under the plough or sown with corn.”

The fourth plea stated, that J. R. and B. J. W., having no other way to Fox Burrs, used the said way as a way of necessity, and that the defendant Bartholomew has, since the alienation, used it as a way of necessity.

The plaintiff demurred generally to the second and third pleas, and took issue on the fourth plea.

The plaintiff also newly assigned trespasses on other occasions, and with unnecessary violence.

To the new assignment the defendant pleaded, first, not guilty; secondly, leave and licence; and thirdly, a plea similar to the third plea to the declaration.

The plaintiff took issue upon the leave and licence alleged in the second plea to the new assignment, and demurred to the last plea.

Holroyd, for the defendant, in support of the demurrers :

The question here is, whether, under this feoffment, a right to a way used by the feoffor over his own land passed.

(BAYLEY, J.: The pleas do not negative there being any other way to get at the close.

PARKE, J.: Where there are ways *in alieno solo*, these words of conveyance will be satisfied.)

In *Harding v. Wilson*† it was held, that by a demise of land, “with all ways thereunto appertaining,” a road over the soil of the lessor would not pass; but that it *would have been otherwise

† 26 R. R. 287 (2 B. & C. 96, 3 Dowl. & Ry. 287).

if the lease had contained the words "heretofore used."† In this case the feoffor could not have a way appurtenant, being seised of the whole. The words "belonging to or appertaining," will not operate as a new grant: *Grymes v. Peacocke*.‡

WILSON
v.
BAGSHAW.

Wightman, contra:

This plea was framed upon the authority of the case of *Morris v. Edgington*,§ where it was held, that if a party having used a way from his close over other land of his own adjoining, demises the close with all ways appurtenant, such way passes to the lessee. The language of the deed is to be taken most strongly against the party whose words are to be construed.||

BAYLEY, J.:

In *Morris v. Edgington* it appeared that the lessor had no way appurtenant *in alieno solo*, and it was taken as a question of fact, whether, under the circumstances, the way passed under the words of the demise.

In pleading a deed the party pleading it is bound to state the deed according to its legal operation.¶ If the defendant has pleaded that he was enfeoffed of the close and way, the jury might have found that he was so, if the whole of the facts taken together would have warranted such a conclusion. The rule *fortius contra proferentem* does not apply to a case where the adverse party has pleaded according to the legal operation of the deed. Here, the Court are bound to consider whether the way was appurtenant at the time of the conveyance.

LITLEDALE, J. concurred.

PARKE, J.:

To bring himself within the case of *Morris v. Edgington*, the defendant might have alleged that *there was no way appurtenant *in alieno solo*, or he might have pleaded a *grant* of the close and way.

[*452]

Judgment for the plaintiff.

† And see *Whalley v. Thompson*,
4 R. R. 826 (1 Bos. & P. 371).

‡ 1 Bulstr. 17.

§ 12 R. B. 579 (3 Taunt. 24).

|| *Vide* 1 Wms. Saund. 258 a.

¶ *Vide ibid.* 235 b. n. (9); 2 Wms. Saund. 97 b. n. (2); Com. Dig. Pleader (C. 37).

1830.
Nov. 10.

DUFOUR *v.* ACKLAND AND TWO OTHERS.

(9 L. J. K. B. 3—4.)

[3]

[*4]

If a jury be satisfied, upon all the facts, that several persons have been engaged in foul play, and have shared in the fruits of it, *they are all liable to an action for money had and received, at the suit of the loser, although some of them may not have been actually present at the time of the play going on, by which the money was won.

THIS was an action for money had and received by the defendants to the plaintiff's use. The cause was tried, before Lord Tenterden, at the Westminster sittings after last Term, when the following appeared to be the principal facts :

The money sought to be recovered had been lost by the plaintiff at a gambling-house. The case of *Thistlewood v. Cracroft* and *Darley*† having decided that money fairly won at play could not be recovered back as money had and received, without calling in aid the statute 9 Ann. c. 14, s. 2, the plaintiff gave evidence to shew that foul play had been practised. The evidence of all the circumstances satisfied the jury on this point, and that the defendants were acting in concert, but in point of fact, only one of the defendants was in the room at the time the play was going on at which play the plaintiff lost his money. It was objected, on behalf of the other defendants, that as the plaintiff was bound to fix all the defendants with the *delictum*,—the foul play at the time of his losing his money,—there was no evidence against those defendants ; but his Lordship was of opinion that the whole facts should go to the jury ; and that if they were satisfied upon those facts that all the defendants were acting for a common object, and shared the fruits of the cheating, the actual presence of all in the room at the time of the play going on, by which the money was won, was not necessary.

The jury having found a verdict for the plaintiff,

Mr. Platt now moved for a rule to shew cause why the verdict should not be set aside. He contended that the *delictum* was the foul play ; and that the defendants, who were not present at it, could not for this purpose be said to be engaged in that *delictum*. But,

† 1 M. & S. 500.

The COURT thought all the facts were properly laid before the jury: that the absence of the defendants at the time of the play was a circumstance to be observed upon, and to be taken by the jury into consideration; but that if they were satisfied upon the whole, that all the defendants were parties to the cheating, and shared in its fruits, they were all equally guilty, and were liable to this action.

DUFOUR
v.
ACKLAND.

Rule refused.

IN THE COURT OF COMMON PLEAS.

PLANCHÉ v. COLBURN AND ANOTHER.†

(8 Bing. 14—16; S. C. 1 Moore & Scott, 51; 1 L. J. (N. S.) C. P. 7; S. C. at Nisi Prius, 5 Car. & P. 58.)

1831.
Nov. 5.
[14]

Defendants engaged plaintiff to write a treatise for a periodical publication. Plaintiff commenced the treatise, but before he had completed it, the defendants abandoned the periodical publication: Held, that plaintiff might sue for compensation, without tendering or delivering the treatise.

THE defendants had commenced a periodical publication, under the name of "The Juvenile Library," and had engaged the plaintiff to write for it a volume upon Costume and Ancient Armour. The declaration stated, that the defendant had engaged the plaintiff for 100*l.* to write this work for publication in "The Juvenile Library;" and alleged for breach, that though the author wrote a part, and was ready and willing to complete and deliver the whole for insertion in that publication, yet that the defendants would not publish it there, and refused to pay the plaintiff the sum of 100*l.*, which they had previously agreed he should receive. There were then the common counts for work and labour.

At the trial before Tindal, Ch. J., Middlesex sittings after last Term, it appeared that the plaintiff, after entering into the engagement stated in the declaration, commenced and completed a considerable portion of the work; performed a journey to inspect a collection of ancient armour, and made drawings therefrom; but never tendered or delivered his performance to

† Followed (in effect) in *O'Neil v. Armstrong*, '95, 2 Q. B. 418, 65 L. J. Q. B. 7, C. A.—R. C.

PLANCHÉ
COLBURN.
[*15]

the defendants, they having finally abandoned the publication of "The Juvenile Library," upon the ill success of the early numbers of the work. An attempt was made *to shew that the plaintiff had entered into a new contract.

The CHIEF JUSTICE left it to the jury to say whether the work had been abandoned by the defendants, and whether the plaintiff had entered into any new contract; and a verdict having been found for him, with 50*l.* damages,

Spankie, Serjt. moved to set it aside, on the ground that the plaintiff could not recover on the special contract, for want of having tendered or delivered the work pursuant to the contract; and he could not resort to the common counts for work and labour, when he was bound by the special contract to deliver the work. If the plaintiff had delivered the work, or so much of it as he had completed at the time "The Juvenile Library" was abandoned, the defendants might have turned it to account in some other way.

TINDAL, Ch. J. :

In this case a contract had been entered into for the publication of a work on Costume and Ancient Armour in "The Juvenile Library." The considerations by which an author is generally actuated in undertaking to write a work are pecuniary profit and literary reputation. Now, it is clear that the latter may be sacrificed, if an author, who has engaged to write a volume of a popular nature, to be published in a work intended for a juvenile class of readers, should be subject to have his writings published as a separate and distinct work, and therefore liable to be judged of by more severe rules than would be applied to a familiar work intended merely for children. The fact was, that the defendants not only suspended, but actually put an end to, "The Juvenile Library;" they had broken their contract with the plaintiff; and an attempt was made, but quite unsuccessfully, to shew that the plaintiff *had afterwards entered into a new contract to allow them to publish his book as a separate work.

[*16]

I agree that, when a special contract is in existence and open, the plaintiff cannot sue on a *quantum meruit*: part of the question here, therefore, was, whether the contract did exist or not. It

distinctly appeared that the work was finally abandoned; and the jury found that no new contract had been entered into. Under these circumstances the plaintiff ought not to lose the fruit of his labour; and there is no ground for the application which has been made.

GASELEE, J. concurred.

PLANCHÉ
v.
COLBURN.

BOSANQUET, J. :

The plaintiff is entitled to retain his verdict. The jury have found that the contract was abandoned; but it is said that the plaintiff ought to have tendered or delivered the work. It was part of the contract, however, that the work should be published in a particular shape; and if it had been delivered after the abandonment of the original design, it might have been published in a way not consistent with the plaintiff's reputation, or not at all.

ALDERSON, J. concurred, and the learned Serjeant

Took nothing.

CORBETT AND ANOTHER v. BROWN.†

(8 Bing. 33—37; S. C. 1 Moore & Scott, 85; 1 L. J. (N. S.) C. P. 13; S. C. at Nisi Prius, 5 Car. & P. 363; 1 Moody & Rob. 108.)

1831.
Nov. 15.
[33]

Plaintiffs being about to furnish defendant's son with goods on credit, enquired of the defendant, by letter, whether his son had, as he asserted, 300*l.* of his own property: defendant answered that he had; the fact being that defendant had lent his son 300*l.* on his promissory note, payable with interest on demand, and had received interest on the note.

The son having afterwards become insolvent: Held, that this was a misrepresentation for which the defendant was liable in damages to the plaintiffs, and a jury having found for defendant, the Court granted a new trial.

THE declaration stated that the plaintiffs, before and at the times of the committing the grievances by the defendant as thereafter mentioned, had been, and still were, warehousemen, and the trade and * business of warehousemen for and during all that time had used exercised and carried on, and still did use,

[*34]

† Cited by Lord HERSCHELL in *Derry v. Peek* (1889) 14 App. Cas. 337, 365, 38 L. J. Ch. 864, 882, 61 L. T. 265.—B. C.

CORBETT
v.
BROWN.

exercise, and carry on, at, &c.; that the plaintiffs, so being warehousemen, and so using, exercising, and carrying on the said trade and business, one Henry Brown, before the committing of the grievance by the defendant thereafter next mentioned, on the 15th of April, 1830, at, &c. applied to the plaintiffs, and then and there stated, that he was about to commence business at Norwich, and that he had 300*l.* capital, his own property, to commence business with, at, &c., and then and there requested the plaintiffs to sell goods to him Henry Brown in the way of the plaintiffs' trade and business of warehousemen, and then and there referred the plaintiffs to the defendant to corroborate the statement of him, Henry Brown, that he had capital 300*l.* of his own property, to commence business with at, &c., whereof the defendant afterwards, and before the sale of the goods by the plaintiffs to the said Henry Brown thereafter next mentioned, on, &c. at, &c. had notice, and was then and there requested by the plaintiffs to inform them if the said Henry Brown had 300*l.* capital, his own property, to commence business with at, &c.; nevertheless the defendant, well knowing the premises, and that Henry Brown had not 300*l.* capital, his own property, to commence business with, at, &c., but fraudulently intending craftily and subtilly to deceive and injure the plaintiff in that behalf, to wit, on, &c. at, &c., falsely, fraudulently, and deceitfully informed the plaintiffs, in answer to their enquiry, that the statement so made to them by Henry Brown as to the 300*l.* was perfectly correct, as the defendant had advanced him, Henry Brown, the money; by means and in consequence of which information so given by the defendant to the plaintiffs as aforesaid, they, not knowing to the contrary, but believing therefrom that Henry *Brown had 300*l.* capital, his own property, to commence business with, at, &c., afterwards to wit, on, &c. and on divers other days and times to wit, at, &c. were induced to give credit to Henry Brown, and did then and there sell and deliver to him divers goods on credit, at or for divers prices, in the whole amounting to a certain large sum of money, to wit, the sum of 700*l.*; whereas in truth and in fact the said Henry Brown, at the time of the defendant so giving the information to the plaintiffs as aforesaid, had not 300*l.* capital, his own property,

[*35]

to commence business with, at, &c., and the defendant, at the time of his so giving the information to the plaintiffs, well knew the same; and whereas in truth and in fact the defendant, at the time of his so giving the information to the plaintiffs, had not advanced the said sum of 300*l.*, or any sum whatever, to Henry Brown. Averment, that Henry Brown now is in bad and insolvent circumstances, and that the sum of 700*l.* is wholly due and unpaid to the plaintiffs, and that they are likely to lose the same.

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BROWN.

Plea, not guilty, and issue thereon.

At the trial before Tindal, Ch. J., London sittings after last Term, it appeared that H. Brown, being about to open a shop at Norwich, applied to the plaintiffs for a supply of goods upon credit; and upon enquiry as to his circumstances, he stated he had a capital of 300*l.* to begin with. The plaintiffs were particular in their enquiries, and H. Brown referred to his father (the defendant) to corroborate the truth of his statement; whereupon the following correspondence took place between the plaintiffs and the defendant:

“Your son, Mr. Henry Brown, has purchased goods of us, and referred us to you in order to corroborate his statement of having 300*l.* capital, his own property, to commence business with at Norwich. We require to *know if such be the case. Any further information you may please to give will oblige us, and which we shall be happy to apply in promoting your son’s object, provided we can consistently do so. We shall be glad of an answer by return of post; and are, &c.

[*36]

CORBETT, SIMES, & Co.”

“In reply to your letter of yesterday, I beg to acquaint you that the statement made to you by my son Henry as to the 300*l.* is perfectly correct, as I advanced him the money, being the utmost I could spare at the present time, in consequence of having a numerous family.

“I hope my son’s dealings with you will be at all times as correct as the present statement; and am, &c.

JAMES BROWN.”

In consequence of the defendant’s letter, the plaintiffs trusted H. Brown from time to time to a large amount, and he soon

CORBETT
v.
BROWN.

became bankrupt in their debt, paid a dividend of 8s. 6d. in the pound, and left the plaintiffs losers of the sum of 389l. 10s. 7d. The 300l. defendant had lent to H. Brown about three weeks before his letter to the plaintiffs, the defendant taking, at the time of the loan, H. Brown's promissory note for the amount, payable on demand, with interest at 5 per cent., which interest was paid up to the time of H. Brown's bankruptcy; but the defendant declined to prove the 300l. as a debt under his son's commission. The jury found for the defendant; whereupon,

Wilde, Serjt. obtained a rule *nisi* to set aside this verdict as contrary to the evidence, the plaintiffs having requested to know whether the defendant's son had 300l. capital, of his own property, and the defendant having stated such to be the fact, when he knew his son had none but borrowed capital.

[37]

Jones, Serjt., who shewed cause, contended that the defendant was warranted in the answer he had given, money lent by a parent being commonly intended as a gift; as it turned out in this case, the father having forborne to prove for his debt under the son's bankruptcy. Besides which, money borrowed, when once in the son's disposition, was as much his own property, and as applicable to mercantile purposes, as money realized by himself.

TINDAL, Ch. J.:

We think there ought to be a new trial in this case on payment of costs; the jury having drawn a conclusion from the defendant's letter, which, it seems to the Court, its contents do not warrant.

GASELEE, J. concurred.

BOSANQUET, J.:

A party who sets up in business on borrowed capital is in very different position in point of credit from a party who sets up unembarrassed with debt.

ALDERSON, J.:

The question is, whether, from the statement's being false within the defendant's knowledge, the Court must not infer fraud.

Rule absolute.

BUDD v. FAIRMANER.†

(8 Bing. 48—53; S. C. 1 Moore & Scott, 74; 1 L. J. (N. S.) C. P. 16; S. C. at Nisi Prius, 5 Car. & P. 78.)

1881.
Nor. 14.
[48]

“Received of B. 10*l*. for a grey four year old colt, warranted sound:”

Held, that the warranty was confined to soundness, and that, without proving fraud, it was no ground of action that the colt was only three years old.

THE plaintiff sued on an alleged breach of warranty in the sale of a horse.

The proof of the warranty consisted of the following receipt, which was drawn up by the plaintiff's servant and signed by the defendant.

“Received of Mr. Budd 10*l*. for a grey four year old colt, warranted sound in every respect.”

The complaint was, that the colt, which the plaintiff had purchased to match another in his possession, was only three years old; as to which, the evidence seemed somewhat conflicting; but the CHIEF JUSTICE, before whom the cause was tried, thinking the warranty applied to soundness only, and that the age was a mere matter of description, the plaintiff was nonsuited.

Wilde, Serjt. moved to set aside the nonsuit, on the ground that the defendant's warranty included the age as well as the soundness of the animal. By the very act of sale, the vendor warrants that the article is such as he professes to sell, and the purchaser proposes to buy. Thus, in *Gardiner v. Gray*,‡ where the defendant undertook to sell the plaintiff waste silk, and sent an article not saleable under that denomination, Lord ELLENBOROUGH said, “The intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them: the purchaser cannot be supposed to buy goods to lay them on a dunghill.” In *Bridge v. Wain*,§ it was held, that where goods sold were described *in the invoice as scarlet cuttings, a warranty was to be inferred that the goods answered the known mercantile description of scarlet cuttings. So in *Yates v. Pym*,|| where the defendant sold what he described

[*49]

† The same principle was decided in *Anthony v. Halstead* (1877) 37 L. T. 433.—R. C.

‡ 16 R. R. 764 (4 Camp. 144).

§ 18 R. R. 815 (1 Stark. 504).

|| 16 R. R. 653 (6 Taunt. 446).

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as prime singed bacon, he was not allowed to shew a custom in the trade to receive bacon to a certain degree tainted, as prime singed bacon; and the bacon in question being tainted, the plaintiff retained his verdict. Here, the purchaser proposed to buy a four year old horse for the purpose of matching another: a three year old colt was unfit for such a purpose, or even for general employment. The seller professed to sell a four year old; and having altogether failed, he is liable in damages for his breach of contract: for the particular warranty as to soundness does not supersede the general warranty that the thing sold is what the vendor professes to sell. Lord Coke says, "if a man make a feoffment by *dedi*, and in the deed doth warrant the land against J. S. and his heirs, yet *dedi* is a general warranty during the life of the feoffor."† And in policies of insurance, a particular warranty does not narrow any general or implied warranty; as that the ship is seaworthy, or the like. If the defendant had sold a gelding or a stallion warranted sound, would it have been a performance of his contract to have delivered a mare?

The Court granted a rule *nisi*, against which

Andrews and Russell, Serjts. shewed cause:

[*50] The instrument produced is a mere receipt, and must be construed according to the intention which appears on the face of it. From the position of the word "warranted," it is plain that soundness was all that *the defendant proposed to warrant, and that age was mere matter of description; if it had been proposed to warrant age as well as soundness, the instrument should have run "warranted four years old, and sound." The cases relied on are not cases of warranty, but of general contract; and doubtless a vendor must deliver an article, answering, in all material points, the description of the article he professes to sell. But a horse, unexceptionable in other respects, does not materially vary from the description given of him if he turn out to be three years old instead of four, more especially as the difference between the two ages is perceptible by inspection of the mouth,

† Co. Litt. 384 a.

which excludes the probability of any intentional misrepresentation. In *Dunlop v. Waugh*,† it was held that what the vendor says about the age of an animal, is not a warranty of the age, for it may be a mere statement of his belief. In *Richardson v. Brown*,‡ the defendant's advertisement was, "To be sold, a black gelding five years old; has been constantly driven in the plough; warranted;" and it was holden that the warranty applied to soundness only. So, in *Dickenson v. Gapp* (tried before Dallas, Ch. J., Middlesex sittings, 1821), the plaintiff sued for a breach of warranty, in proof of which he adduced the following receipt: "Received of Mr. Dickenson 100*l.* for a bay gelding, got by Cheshire Cheese; warranted sound;" and then shewed that the horse was not got by Cheshire Cheese. DALLAS, Ch. J. held, that the warranty was confined to soundness, and nonsuited the plaintiff, who never moved to set aside that decision. So in *Jendwine v. Slade*§ it was held, that putting down the name of an artist in a catalogue as the painter of a picture, is not such a warranty as will subject the party selling to *an action, if it turn out that he might be mistaken, and it was not the work of the artist to whom it was attributed. Upon a mistaken representation a party is not liable, unless he be guilty of fraud, but upon a warranty he is liable at all events: *Williamson v. Allison*.|| If the defendant be held to have warranted the age, he may, with as much justice, be contended to have warranted the colour of the horse, or any other quality equally obvious to the sense.

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Wilde and Spankie, Serjts. :

Richardson v. Brown was not an action on a warranty, but for the price of a horse which the defendant had kept and used; and the alleged warranty being apparently resorted to by an afterthought for the purpose of eluding payment, was not entitled to much favour. There is no printed report of *Dickenson v. Gapp*; and as to the age of the horse being apparent upon inspection, it does not appear but that the plaintiff purchased without inspection on the recommendation of the defendant. The principle which applies to such transactions is clearly laid down in *Shepherd v. Kain*,¶

† 1 Peake N. P. 167.

|| 2 East, 446.

‡ 25 R. B. 648 (1 Bing. 344).

¶ 24 R. B. 344 (5 B. & Ald. 240).

§ 5 R. B. 754 (2 Esp. 572).

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where the defendant sold what he described to be "a copper-fastened vessel; to be taken with all faults." The Court held, "with all faults must mean, all faults which it may have consistently with its being the thing described;" and that as the ship was not copper fastened, the plaintiff was entitled to recover for a breach of warranty.

TINDAL, Ch. J.:

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In this case a written instrument was produced by the plaintiff to shew the nature of the contract between him and the defendant, and we are to interpret that instrument like all others, according to the intention of the parties. The instrument appears *to be a receipt for 10*l*. "for a grey four year old colt, warranted sound." I should say that, upon the face of this instrument, the intention of the parties was to confine the warranty to soundness, and that the preceding statement was matter of description only. And the difference is most essential. Whatever a party warrants, he is bound to make good to the letter of the warranty, whether the quality warranted be material or not: it is only necessary for the buyer to shew that the article is not according to the warranty: whereas, if an article be sold by description merely, and the buyer afterwards discovers a latent defect, he must go further, allege the *scienter*, and shew that the description was false within the knowledge of the seller. And where there is an express warranty as to any single point, the law does not beyond that raise an implied warranty that the commodity sold shall be also merchantable. Therefore, in *Parkinson v. Lee*,† upon a sale of hops by sample, with a warranty that the bulk of the commodity answered the sample, although a fair merchantable price was given, it was held that the seller was not responsible for a latent defect, unknown to him, but arising from the fraud of the grower from whom he purchased. A party who makes a simple representation stands, therefore, in a very different situation from a party who gives a warranty. And if so, how can I say that this distinction was not present to the mind of the defendant in this case? When he sells a grey four year old colt, warranted sound, he means to

† 6 R. R. 429 (2 East, 314).

say that he will be responsible for the soundness, but that the rest is only matter of representation, for which he will not be answerable, unless it be shewn to be false within his knowledge. Many cases have been referred to, and some stress has been laid on the effect of the word *dedi* when contained in a grant; *but, according to Lord ELDON, in *Browning v. Wright*,† words of that nature “import a contract in law, the effect and meaning of which would be affected by the subsequent words of the indenture;” and in the cases relied on for the plaintiff, the sellers had delivered commodities essentially different from those which they had professed to sell. *Richardson v. Brown* and *Dickenson v. Gapp* are authorities in point for the defendant.

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GASELEE, J. concurred.

BOSANQUET, J. :

In every case where the contract appears on a written instrument, the instrument must be construed according to the intent of the parties. As, where the dealing is by a contract note, the article delivered must agree with the terms of the note; or, where a ship is insured, it must correspond with the warranties contained in the policy. What is the instrument here? Not a contract of sale, but a mere receipt, describing an antecedent contract. Are we to infer from the terms used, that the party had expressly contracted the animal should be four years old? The collocation of the word “warranted” shews that such was not the intention of the parties. *Richardson v. Brown* proceeded on this principle, and *Dickenson v. Gapp* is almost the same case as the present. Interpreting this instrument, therefore, according to the intention of the parties, I think it clear that the warranty was confined to soundness.

ALDERSON, J. :

It is not necessary to refer to *Richardson v. Brown*, because we can see here, from the collocation of the word “warranted,” that it is confined to the quality of soundness.

Rule discharged.

† 5 R. R. 521 (2 Bos. & P. 13).

1831.
Nov. 23.

BRADLEY v. RICARDO.

(8 Bing. 57—61; S. C. 1 Moore & Scott, 133; 1 L. J. (N. S.) C. P. 36.)

[57]

Where a party being surprised by a statement of his own witness, calls other witnesses to contradict him as to a particular fact, the whole of the testimony of the contradicted witness is not, therefore, necessarily, to be repudiated by the Judge.

THIS was an action against the sheriff of Gloucestershire for a false return of *nulla bona* to a writ of *fi. fa.*

At the trial the plaintiff called the sheriff's officer to prove the receipt of the warrant to levy.

Upon cross-examination, the witness affirmed that no goods could be found belonging to the party against whom the levy was directed.

The plaintiff's counsel was then proceeding to prove his case by other witnesses, and to contradict the sheriff's officer as to his statement that no goods could be found, when the learned Judge who presided thought that, if the plaintiff were permitted to contradict a witness placed in the box by himself, as to a particular fact, the whole evidence of the witness must be struck out; upon which the plaintiff was nonsuited.

Wilde, Serjt. obtained a rule *nisi* to set aside the nonsuit, contending that though a party is not allowed to throw general discredit on the character of a witness called by himself, he may set him right as to any particular fact which he may have stated incorrectly, and the rest of his evidence may stand.

Ludlow, Serjt. shewed cause, and relied upon *Alexander v. Gibson*,† where it was held that if a witness unexpectedly gave evidence against the party calling him, although his evidence could not be in part relied upon, and the rest of it disproved, it might be entirely repudiated, and witnesses might be called on the same side to contradict him. And Lord ELLENBOROUGH said, “The *party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by

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† 11 R. R. 797 (2 Camp. 555).

other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." The witness was not a witness of necessity, for the fact of the receipt of the warrant might have been proved by another.

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TINDAL, Ch. J. :

This rule must be made absolute. The object of all the laws of evidence is to bring the whole truth of a case before a jury; but if this rule were to be discharged, that would no longer be the just ground on which the principles of evidence would proceed, but we should compel the plaintiff to take singly all the chances of the tables, and to be bound by the statements of a witness whom he might call without knowing he was adverse, who might labour under a defect of memory, or be otherwise unable to make a statement on which complete reliance could be placed. Suppose a case in which, for some formal proof, the plaintiff is obliged to make a witness of the defendant's attorney, who on cross-examination makes a statement adverse to the plaintiff; is the plaintiff to be precluded from calling the witnesses whom he had prepared before to shew the real state of the case? It has been urged as an objection, that this would be giving credit to the witness on one point after he has been discredited on another; but difficulties of the same kind occur in every cause where a jury has to decide on conflicting testimony. The general rule is, that a party shall not be permitted to blast the character of a witness called in support of his case by adducing general evidence to his discredit; but I have never heard it said that when surprised by a statement contrary to fact, he may not call *another witness to shew how the fact really is. It is a common occurrence that persons called on to give their testimony decline to make any statement before they appear in Court. It would be a great hardship if the party compelled to call such persons should be bound by every thing they may choose to say. The alteration in the general rule which the defendant in this case seeks to establish, would lead to great inconvenience and injustice. The rule, therefore, which has been obtained for setting aside the nonsuit must be made absolute.

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BRADLEY GASELEE, J. :

RICARDO.

In *Alexander v. Gibson* Lord ELLENBOROUGH says, "The party is not to set up so much of a witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency. But if a witness is called, and gives evidence against the party calling him, I think he may be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated." With deference to Lord ELLENBOROUGH, it seems to me that it is for the jury to say whether his evidence is to be entirely repudiated or not. It is going too far to determine that the party shall suffer because a witness is not consistent in his testimony. *Ewer v. Ambrosset* is in point.

BOSANQUET, J. :

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I think that this nonsuit ought to be set aside. The general rule is, that a party who calls a witness into the box is not permitted to prove generally that he is unworthy of credit, but may contradict him as to particular facts. It has been objected, however, that you cannot contradict him as to a particular fact without repudiating his evidence altogether. But the practice has always been the other way, and if there be any thing in *Alexander v. Gibson* in support of the *argument urged on the part of the defendant, I cannot agree in that view of the subject: it is inconsistent with both principle and practice. A party is often compelled to call an adverse witness; and if he, on cross-examination or otherwise, makes statements inconsistent with fact, another witness may be allowed to contradict him: and there is no instance of a Judge having been called upon in such a case to strike out the rest of his evidence. The discrepancy may afford a fair topic for counsel as to the degree of credit to which the witness is entitled, but the whole statement must go to the jury, who, in forming their judgment, are often guided by the manner and feelings of the witness. If he states some facts which are adverse to the bias under which he speaks, and some which coincide with it, the jury may, without inconsistency, believe the one statement and reject the other.

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I am of the same opinion, and adhere to the rule as laid down in Buller's *Nisi Prius*. A party will not be permitted to produce general evidence to discredit his own witness. That is the true rule, and I cannot but dissent from the restriction of it which has been ascribed to Lord ELLENBOROUGH. The case cited by him, *Lowe v. Jolliffe*, establishes the contrary of the proposition for which it was cited. There, all the attesting witnesses swore to the insanity of the testator when the will was executed, but they were contradicted by other evidence, and the will was established.

Now, in order to prove a will by an insane person, it must be proved, not only that the testator was insane but that the will was executed; and in that case, although the testimony was rejected as to the sanity, it was received as to the execution: that agrees with good sense and the general practice.

A party calls many witnesses; one of them states a fact adverse to his claim, another explains the statement: *was it ever heard of that on such an occasion the whole testimony of the former witness should be struck out? A witness is called to prove a notice to produce a written instrument: upon cross-examination he makes some incorrect statement: is the party who calls him and who controverts this statement to be precluded from giving a copy of the written instrument in evidence, because, as it has been argued, the testimony of the witness as to the notice is to be struck out? Such a rule would lead to the greatest inconvenience. [*61]

The rule as laid down by Mr. Justice BULLER is intelligible and clear, namely, that a party shall not be permitted to throw general discredit on a witness whom he has put into the box; but it would be monstrous if the whole of his testimony were to be struck out because a subsequent witness sets him right as to a single fact which he may have stated incorrectly.

Rule absolute.

1831.
 Nov. 25.

PALMER v. MARSHALL.

(8 Bing. 79—83; S. C. 1 Moore & Scott, 161; 1 L. J. (N. S.) C. P. 19.)

[79]

A policy on ship at and from Bristol to London, attaches during the vessel's stay at Bristol; therefore, where the assured did not sail till three months after the execution of the policy: Held, that the delay was a material variation of the risk.

THIS was an action on a policy of assurance for 1,500*l.* on the yacht *Ruby*, at and from Bristol to London. The policy bore date the 28th of January, 1831. The declaration stated, that the plaintiff had effected it by M'Ghie and Page, his agents in that behalf, and averred a loss by being run down by another vessel through the violence of winds and waves.

At the trial before Taunton, J., last Dorchester Assizes, it appeared that the *Ruby*, a yacht of thirty-seven tons, not coppered, at the date of the policy was lying in the float at Bristol, where she continued till the 17th of May, when she commenced her voyage round the Land's End, and was run down off the Start on the 21st of May.

The defendant's subscription to the policy was admitted, and it was shewn that the plaintiff was the only person interested in the vessel; but there was no express proof that M'Ghie and Page were the plaintiff's agents.

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The omission of this proof was objected to on the part of the defendant, as a fatal defect in the plaintiff's case, but the objection was overruled.

It was also objected, that the voyage having been deferred for so long a time after the date of the policy, the risk contemplated had been essentially varied, and that the defendant was, therefore, discharged by a *quasi* deviation; but the learned Judge held, that upon this policy the risk did not attach till the vessel commenced her voyage, and left it to the jury to say whether the vessel had been lost in the voyage intended. The jury found for the plaintiff, and also, that the risk had not been varied.

Wilde, Serjt. obtained a rule *nisi* to set aside the verdict, on the two objections urged at the trial, and also, as against evidence.

Merewether, Serjt. shewed cause:

The proof that no other person was interested in the vessel,

connected with the statement on the policy subscribed by the defendant, that it had been effected by M'Ghie and Page as agents, is sufficient evidence that they were agents for the plaintiff.

As to the alleged deviation, or variation of risk, the learned Judge correctly left it to the jury to say whether the vessel had been lost in the course of the voyage intended; for upon insurances at and from a given place, the risk only attaches when the vessel is ready to begin her voyage from the place specified. Thus, when ships are engaged on the banks of Newfoundland in the pursuits which are termed banking, the risk on a policy on ship at and from Newfoundland to Europe, attaches only from the time when the banking ends: *Vallance v. Dewar*.† So, in *Williamson v. *Innes*,‡ the risk on a policy at and from Algoa

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† 10 R. R. 738 (1 Camp. 503).

‡ WILLIAMSON v. INNES.

Homeward policy on freight, at and from Algoa, attaches, when the ship is at A. in a condition to begin to take in her homeward cargo.

Assumpsit on policy, on freight at and from Algoa Bay and Table Bay, both or either, to London.

Declaration stated that the ship had arrived, and was in good safety, at Algoa Bay, that a homeward cargo was ready for her under her charter-party, and that before it was put on board she was lost by perils of the sea.

Plea, general issue.

At the trial, the captain proved his arrival at Table Bay; the discharge of that part of the cargo which was destined for that place; and that he took in about sixty tons of goods for Algoa Bay, where he arrived on the 30th of September, and came to anchor. Till the 8th of October he was engaged in discharging his outward cargo, but on that day he gave orders that no more of the outward cargo should be discharged till some of the homeward cargo should be on board, as his load was reduced to about seventy tons, which, in his judgment, was neces-

sary for the safety of the ship, of 144 tons register; and he intended to take in, the next morning, part of the homeward cargo, which was ready for him.

Before that time, however, the ship was lost in a hurricane.

For the defendant, it was contended, that at the time of the loss, the ship was not in a state to begin to take in her homeward cargo, and consequently that the voyage at and from Algoa Bay had not commenced.

Several captains of vessels were called, who stated that, in their judgment, thirty tons were quite sufficient to keep in the ship for her safety, and that with seventy tons of her outward cargo on board she could not be ready to take in her homeward cargo.

Lord LYNDEHURST, C. B. told the jury that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover; if not, then the verdict ought to be for the defendant.

Verdict for the plaintiff.

F. Pollock and Cresswell for the plaintiff.

Campbell and Maule for the defendant.

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May 18.

*Eschequer
Sittings in
London.*

[81, n.]

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Bay to London, was held to attach only when the ship was in a condition to take in her homeward cargo at Algoa Bay. Here the jury have found that there was no variation of the risk, which distinguishes the case from **Mount v. Larkins*,† where it was expressly found that there had been unreasonable delay.

TINDAL, Ch. J. :

This cause must be sent down to another jury. The learned Judge who tried it, did not state accurately the time at which the risk attached. The policy was at and from Bristol to London ; and though there are excepted cases in which the risk would not attach on such a policy until the time of sailing, as where a ship is not finished, or is undergoing a course of repair at the time the policy is effected, yet here, where the vessel was lying in port, complete and ready for sea, the risk on the policy could only commence from its date. Besides this, the evidence was not complete as to the agency. The statute 25 Geo. III. c. 44, requires that the names of persons interested shall be inserted in the policy, or the names of persons who shall effect the same as agents for persons interested. And the declaration states, that the plaintiff, by M'Ghie and Page, his agents in that behalf, caused to be made a certain policy of insurance ; but the evidence only amounts to proof of the defendant's subscription, and the plaintiff's interest in the vessel. No proof was offered that M'Ghie and Page were his agents.

GASELEE, J. :

In *Vallance v. Dewar*, and other cases where the risk on policies at and from a place has been held not to attach till the time of departure, there has been evidence of a particular usage to that effect. But there is no evidence to take this case out of the general rule. The direction to the jury, therefore, was not correct. As to the proof of agency, the admission at the trial proved nothing more than the handwriting of the defendant.

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BOSANQUET, J. :

I am of the same opinion. In policies at and from a given place, the risk attaches while the vessel is at the place, unless in

† *Post*, p. 631.

certain excepted cases, of which this is not one. The risk here attached on the vessel as long as she was at Bristol. *Williamson v. Innes* was a policy on freight, which could not take effect till the cargo was on board. Here, also, there was an entire failure in the proof of agency. It was not sufficient to prove the defendant's subscription of the policy; the plaintiff was bound to shew for whom M'Ghie was agent.

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Rule absolute.

[At a subsequent trial (8 Bing. 317) the plaintiff was nonsuited; and—it having been agreed that the plaintiff should stand in the same position as if the case had gone to the jury with a strong direction on the part of the Judge that the risk was varied by delay—a motion for a new trial was refused; on the ground that such a direction would have been right. The same principle was maintained in another action on the same policy: *Palmer v. Fenning* (1888) 9 Bing. 460.]

MOUNT v. LARKINS.†

(8 Bing. 108—123; S. C. 1 Moore & Scott, 165; 1 L. J. (N. S.) C. P. 20; 1 Dowl. P. C. 262.)

1831.
Nov. 25.
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Defendant executed, 28th of February, 1824, a policy of assurance on freight from Singapore to Europe, with liberty to sail to, touch, and stay at, any places whatsoever, to load, unload, reload, and for all necessary purposes whatever. The ship sailed from London in September, 1823, and having been detained by the captain for his own purposes at Van Diemen's Land, did not arrive at Singapore till the 30th of March, 1825; she sailed thence on the voyage insured the 3rd of May, 1825:

Held, that by so long a postponement of the risk the defendant was discharged, a jury having found the delay unreasonable.

ASSUMPSIT on a policy of insurance on ship *Aquila*, at and from Singapore‡ and Batavia, both or either, to the ship's port of discharge in Europe, with liberty to sail to, touch, and stay at any ports and places whatsoever and wheresoever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever. The policy

† Cited and followed in *De Wolf v.* 150.—R. C.
Archangel Maritime Bank (1874) L. R. ‡ *Sic* in the report.
9 Q. B. 451, 455, 43 L. J. Q. B. 147,

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was declared to be on freight, and valued, and a loss was averred by perils of the sea on the voyage from Singapore to London.

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By a special verdict it was found that the policy of insurance was made and entered into between the plaintiff and the defendant, on the 28th of February, 1824; that the ship sailed from England in the beginning of September, 1823, having on board thereof divers passengers and goods, bound for and deliverable at the Cape of Good Hope, Van Diemen's Land, and *Sydney, New Holland, and was under the command of Joseph Thomas Watson, the master thereof; that by charter-party, dated the 26th of May, 1823, the ship, after discharging her cargo at New Holland, was to proceed to Singapore, and from thence to Malacca and Penang, both or either, or to Batavia only, to take on board a cargo for Europe, on account of the freighters; and that before the ship sailed from England as aforesaid, the plaintiff caused instructions to be delivered to the said J. T. Watson, the master of the said ship, of which the following was a copy:

“ You having the command of the ship *Aquila*, bound on a voyage to the Cape of Good Hope, Van Diemen's Land, and New South Wales, and from thence to Singapore and other ports of lading as per charter-party, and having shipped twenty-four hogsheads of stout and a quantity of deals, consigned to yourself for sale on my account,—copy of invoice at back of this,—you will please dispose of them to the best account, taking care not to leave them behind you unsold. As you have a small quantity of goods to deliver at the Cape, should you be able to procure any goods and passengers from that place to New Holland, &c., to the amount of not less than from 300*l.* to 400*l.*, and at the same time to be able to dispose of my investment at about the invoice price, by detaining the ship not more than ten days, you will use your own discretion, but think it will answer your purpose so to do. On your arrival at Van Diemen's Land, as you will have a very considerable sum of money to receive as freight and passage money, beg your particular attention to the same. You will please to caulk the half deck and between decks as soon as convenient, fearing any leak might damage the cargo stowed below; and think the less water there is used for washing below the better, fearing the consequences above stated.

After leaving Van Diemen's Land you will proceed to New Holland, making every exertion in your power at that port to enable you to proceed to Sincapore, at which port hope and trust you will be fully loaded; and on your arrival at said port or ports you will give the earliest information to commence your lay days; and let me beg of you to make all the interest you can with the merchants for heavy goods, to extend from 200 to 300 tons, your ship requiring a large proportion, and will prove a great advantage in point of freight; and as you are not likely to get many passengers home, and should suppose you will have a large proportion of light goods, you will make the best you can with your accommodation, and, if necessary, take down the aft bulk heads, but the after cabin would advise you not to disturb;—proportion of cabin freight you will of course be entitled to. Shall be happy to hear from you at every convenient opportunity, at sea or in port.

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“RICHARD MOUNT.”

The ship arrived at the Cape of Good Hope on the 3rd of December, 1823, and sailed the 24th of the same month.

On the second day after the ship anchored at the Cape of Good Hope, part of her cargo belonging to the said J. T. Watson was discharged. At the time of making the said policy of insurance the ship was at Hobart Town, Van Diemen's Land, having arrived there on the 4th of February, 1824. Part of the outward cargo of the ship and three of the passengers were landed at Hobart Town, and some delay was occasioned at Hobart Town by the difficulty in getting at different parts of the cargo. The ship sailed from Hobart Town on the 27th of March, 1824, arrived at George Town, Port Dalrymple, in Van Diemen's Land, on the 6th day of April, *1824, and there landed others of the said passengers, and other parts of the cargo. The said passengers and cargo were necessarily conveyed by the boats of the ship a distance of forty miles from the ship up the river there. The ship sailed from George Town for Sydney, New Holland, on the 29th of July, 1824; arrived at Sydney on the 5th of August, 1824, there landed the remainder of her passengers, and of her said outward cargo, and sailed from Sydney on the 18th of November in the same year for Sincapore. She met with very bad weather;

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was twice driven back ; once to Sydney and once to Hobart Town ; and arrived at Singapore on the 30th of March, 1825, where the risk intended to be insured by the said policy was to commence. She sailed from Singapore on the voyage intended to be insured on the 3rd of May, 1825 ; arrived at Penang on the 17th of May in the same year, and remained there until the 23rd of June in the same year, when she proceeded on her voyage towards London.

At the time when the risk by the policy intended to be insured against, was to commence, the ship was well and sufficiently manned, and in all respects seaworthy. And whilst she was proceeding upon the voyage in the policy mentioned, and during the continuance of the risk intended to be insured against thereby, she was by the perils of the sea wholly lost, as in the declaration was alleged.

It was then found that the said J. T. Watson, master of the ship, after his arrival at Hobart Town as aforesaid, was ashore, and came on board the ship frequently, and was building a house upon some land belonging to him there. That the said J. T. Watson also, whilst at Hobart Town, purchased a schooner, which he fitted out and sent to sea on a sealing voyage in the early part of April, 1824. That the said schooner was fitted out from the stores of the ship *Aquila*, was partly manned with *mariners, part of her crew, was commanded by the chief mate of the *Aquila*, and was absent about two months. That the said schooner returned from the sealing voyage on which she had been despatched, and was again sent upon a second sealing voyage. That the said schooner had not returned from her second sealing voyage before the *Aquila* left Sydney on the 18th of November, 1824 ; and the said mate and the crew of the schooner never again found the *Aquila*. That there was unreasonable and unjustifiable delay between the making of the policy of insurance and the commencement of the risk intended to be insured against as aforesaid. That the plaintiff was, at the time of the making of the said policy of insurance, and continually, until and at the time of the loss of the ship as aforesaid, interested in the same to the amount of the sum insured thereon as aforesaid.

The case was argued in Trinity Term.

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Taddy, Serjt. for the plaintiff :

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The question is, whether, upon a policy such as the present, there is any implied warranty that the ship shall sail from the port where the risk is to commence, within any certain time ; for the assured is not bound by a mere representation without fraud : *Bize v. Fletcher*,† *Pawson v. Barnevelt*.‡ The general rule is, that if the insurer wishes to confine the risk, he must state on the policy the time within which he proposes the voyage shall commence. Emerigon (vol. ii. c. 13, s. 2, p. 16) states the following case : “ Les sieurs Garnier, Mallet, et Dumas, de Cadix, s'étaient rendus assureurs sur le corps du vaisseau *Nostra Senora Oranzaza*, capitaine Joseph Ventura, de sortie de Cadix jusqu'à Cumana, et de retour à Cadix. Le 19 Décembre, 1752, ils se firent réassurer *à Marseille 18,000 liv. avec clause qu'en cas de perte ils ne seraient tenus de produire d'autre sorte d'écriture que le seul acquit du paiement qu'ils en auraient fait au premiers assurés. Ce navire arriva heureusement à Cumana, dans l'Amérique Méridionale. Il y fit un long séjour. En 1756 Garnier, Mallet, et Dumas, se pourvurent au consulat de Cadix, en résiliation du risque, attendu le trop long séjour que le navire faisait à Cumana ; ils furent déboutés de leur requête. Enfin, ils apprirent que le navire était devenu innavigable à Cumana. Cet accident fut notifié aux réassureurs de Marseille, par exploit du 2 Juin, 1761.

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“ Le consulat de Cadix condamna Garnier, Mallet, et Dumas à payer la perte. Ils la payèrent par quittance du 26 Avril, 1762. Le 4 Septembre suivant, les sieurs Kick et Durantet, porteurs de la police de réassurance, se pourvurent contre les réassureurs, et communiquèrent la quittance dont je viens de parler.

“ Les réassureurs opposaient que le risque s'étoit évanoui par le laps de dix années ; et qu'un navire qu'on laisse croupir pendant si long-tems dans un port ne peut que devenir innavigable.

“ Sentence du 26 Juin, 1764, qui régla la cause à droit sur le fond et principal, et qui condamna les réassureurs au paiement provisoire des sommes réassurées. Ceux-ci appelèrent de cet sentence au chef du provisoire. Ils obtinrent un décret de

† Dougl. 288.

‡ Dougl. 12, in note.

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surséance. Arrêt du 26 Juin, 1765, au rapport de M. de Fortis, qui révoqua le décret de surséance, et qui confirma la sentence, avec amende et dépens. Ensuite de cet arrêt, tous les réassureurs, à l'exception de B., qui avait fait faillite, payèrent les sommes par eux réassurées, en principal, intérêts et dépens, et renoncèrent à la poursuite du fond.

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“ Seconde sentence rendue le 15 Novembre, 1766, qui condamna les administrateurs de la faillite de B. à payer définitivement la somme de 2,000 liv. par lui *souscrite, et qui les y condamna sous l'hypothèque du 12 Décembre, 1752, jour de la réassurance reçue par courtier. Cette dernière sentence fut acquiescée.”

Upon which he observes, “ On ne saurait disconvenir que les réassureurs étaient non recevables à contester le remboursement d'une perte payée par les premiers assureurs, dont ils étaient garans. Mais il paraît dur qu'un navire devenu innavigable dans un port lointain, où on la laissoit oisif pendant plusieurs années, soit à la charge des assureurs. Cependant, s'il n'y a aucune fraude de la part des assureurs assurées, la règle générale est pour ceux-ci. La loi n'a établi sur ce point aucun délai fatal; et les assureurs doivent s'imputer de n'avoir pas limité le tems de l'assurance. Car si la police renferme quelque pacte particulier, au sujet de tout ce que dessus, il faut s'y tenir.”

And this is the rule of the law of England. In *Beckwith v. Sydebotham*† it was held, that if the owner of a ship receives a letter from the captain, written on her arrival in a foreign port, giving such an account of her as to render it probable that she must remain there for the purpose of being repaired, beyond the time that would be necessary for her to take in her cargo, that letter need not be communicated to the underwriters in effecting a policy of insurance upon her, at and from the foreign port to a port in England, unless information on the subject be particularly called for. And Lord ELLENBOROUGH said: “ That if it was necessary to have disclosed this letter as governing the time when the ship would sail, it would in all cases be necessary to inform the underwriters where any repairs were wanting, and he believed it very frequently happened, that a ship must have

† 10 R. R. 652 (1 Camp. 116).

something done to her before she would sail on her homeward-bound voyage. If the underwriters wish *to have particular information upon this subject, they ought to ask for it; and if they were disposed only to insure a voyage made during a particular season of the year, they should (as was commonly done with Jamaica ships) insert a warranty in the policy that the ship shall sail on or before a certain day."

Emerigon states another case in the same page: "En 1753, un négociant s'était fait assurer in quovis, 8,000 liv., en espèces d'or et d'argent qu'il attendait de Buenos Aires. En 1764, les assureurs requièrent que les risques fussent déclarés finis. L'assuré soutenait que ses fonds n'étaient pas encore arrivés, et que la police ne renfermait aucune terme. Sentence de l'Amirauté de Paris, qui déchargea les assureurs, sur le fondement que les risques ne doivent pas être éternels, et que onze ans d'attente doivent suffire."

But there the insurers applied to the Court under a peculiar law to end the risk. Independently of such an application Emerigon says (p. 18), that nothing will discharge them but the contract coming to an end: not even the change from peace to war. The same law is laid down by Pothier (*Contrat d'Assurance*, pl. 63, s. 2, c. 1, p. 102)—"Que si le tems qui doivent durer les risques des retours qu'on fait assurer n'était pas limité *arbitrio judicis*, les assureurs seraient exposés à être trompés tous les jours; car la rentrée de ces retours étant le plus souvent inconnue aux assureurs, un négociant de mauvaise foi, après avoir reçu en entier les retours qu'il a fait assurer, pourrait long tems après faire valoir l'assurance sur des marchandises qu'il aurait perdues, en disant, contre la vérité, qu'elles font partie des retours qu'il a fait assurer."

Here the jury have not found that there was fraud; that the plaintiff was accessory to the delay; or that the delay has increased the risk. There is nothing here to determine the contract but the assumption, that the *vessel did not arrive at Singapore in reasonable time. What is reasonable time ought to be determined, not by the jury, but by the Court; and how can the Court determine, when the insurer has engaged to insure from Singapore, without stipulation for any time by which the

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vessel should arrive at that port? The Court cannot interpolate a warranty, which the insurer has not thought fit to require.

Spankie, Serjt. *contra* :

It is an implied condition in every contract of assurance, that the assured shall begin his voyage within a reasonable time, otherwise the insurer might never be exonerated from his risk; and if his risks do not regularly evolve, how is he to calculate his funds and conduct his business? Emerigon, c. 1, s. 3, lays it down, “La condition dépend de l’expédition maritime plutôt que de la volonté de l’assuré;” and in c. 13, s. 9, “Si le voyage est autre que celui qui a été assuré l’assurance reste caduque.”

The application to the Court, under the law of France, to end the risk, proceeds on this principle; the *arbitrium judicis* supplying the place of the finding of the jury here as to what shall be a reasonable time; Pothier, pl. 63, c. 1, s. 2; a question which cannot be determined in any other way when there is no express stipulation on the subject.

[*117] Emerigon (c. 13, s. 10), discusses the lawfulness of undertaking another voyage pending the insurance. After citing two old cases in which it had been decided by the French Courts that such voyage *might* lawfully be undertaken, he observes: “Mais cette jurisprudence était contraire au principe établi dans la précédente section, et à la doctrine de tous nos auteurs, qui nous apprennent que si, avant que le voyage assurée soit commencé, le capitaine en entreprenne un autre, l’assurance *est nulle, et la prime doit être restituée.” To commence the voyage insured within a reasonable time is, therefore, a condition in the contract; and all conditions, for the performance of which no time is specified, must be performed within a reasonable time: Co. Lit. 208 a; *Bothy’s* case,† 5 Vin. Abr. Condit. (C. b.) pl. 11. A principle which pervades the whole of the law. Promises of marriage, notices of dishonour, and notices of abandonment, must be all attended to within a reasonable time; and what is a reasonable time is a question for the jury, subject to the direction of the Judge: *Anderson v. Royal Exchange Assurance Company*.‡

† 6 Co. Rep. 31.

‡ 8 R. B. 589 (7 East, 38).

So when goods do not correspond with sample, they must be returned within a reasonable time: *Parker v. Palmer*.†

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In *Ougier v. Jennings*,‡ where the question was, whether by usage, ships in the Newfoundland trade might make intermediate voyages before the policy attached, Lord ELDON said: “If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect. If several ships belonging to a merchant arrive together at Newfoundland, and finding cargoes for some only, he *bonâ fide* sends the rest on an intermediate voyage, it seems reasonable. Thus putting it altogether upon the reasonableness of the time employed. And *Vallance v. Dewar*§ proceeded on the ground that this usage was generally known. In *Hull v. Cooper*|| it was held, that if a ship be insured at and from a certain place, where, in fact, she was not at the time, but arrived there after some interval, (but the fact was not communicated to the underwriters, who did not call for information on the *subject,) it was a question for the jury, whether the delay which intervened materially varied the risk.

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In *Smith v. Surridge*¶ Lord KENYON said, “that if there was a voluntary delay on the part of the plaintiff, there was no doubt it would avoid the policy.” And in *Hartly v. Buggin*†† Lord MANSFIELD considered delay as a *quasi* deviation, because it places the underwriter in a different position. *Beckwith v. Sydebotham* turned only on the necessity of a certain communication, and does not affect the present question.

Taddy :

Hartly v. Buggin, *Driscoll v. Passmore*,‡‡ *Smith v. Surridge*, *Ougier v. Jennings* and *Vallance v. Dewar*, are cases either of deviation, or of alleged delay, after the commencement of the risk, and do not apply where the question is, whether delay before the risk attaches, will avoid the contract. But in *Hull v. Cooper*, as in *Beckwith v. Sydebotham*, Lord ELLENBOROUGH

† 23 R. R. 313 (4 B. & Ald. 387).

¶ 6 R. R. 837 (4 Esp. 25).

‡ 10 R. R. 739, n. (1 Camp. 505, n.).

†† 1 Park Ins. 513.

§ 10 R. R. 738 (1 Camp. 503).

‡‡ 4 R. R. 782 (1 Bos. & P. 200).

|| 13 R. R. 287 (14 East, 479).

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decides that it rests with the insurer to ascertain or fix when the risk shall commence.

The authorities to shew that a condition must be performed within a reasonable time are equally inapplicable, for the question here is, whether the condition exists in the contract, and if not, whether the Court can interpolate it. Emerigon in discussing the question of an intermediate voyage, only proposes to shew that the insurance must be confined to the voyage contracted for: the period at which the risk is to commence must be left to the parties contracting, and ought not to be fixed by the interposition of a Court. Time is not of the essence of the policy, and the insurer may always protect himself by enquiry and stipulation. Besides, the delay here, was on the outward voyage, with the conduct of which the underwriter had no concern.

Cur. adv. vult.

[119] TINDAL, Ch. J.:

This was the case of an action brought upon a policy made at London on the 28th of February, 1824, upon the ship *Aquila*, “at and from Singapore and Batavia, both or either, to the ship’s port or ports of discharge in Europe, not to the northward of Hamburgh, with liberty to call at Cowes for orders.” A liberty was also given in the policy “to sail to, touch and stay at any ports or places whatsoever and wheresoever, particularly at the Cape of Good Hope, St. Helena, or elsewhere, to load, unload, and reload goods and passengers or otherwise, and for all or any other necessary purposes whatsoever.” The policy was declared to be on freight, and the freight, valued. The declaration then stated a total loss of the ship while proceeding on the voyage from Singapore to London, being the voyage mentioned in the policy, by the perils of the sea, whereby the freight became wholly lost to the plaintiff.

Upon the trial of the cause the jury found a special verdict, of which the only facts material for the consideration of the question which has been argued before the Court, are the following: That the policy was made on the 28th of February, 1824, at which time the ship was at Hobart’s Town, Van Diemen’s Land. That the ship sailed from England in the beginning of September,

1823, under a charter-party, by which the ship, after discharging her cargo at New Holland, was to proceed to Sincapore, from thence to Malacca and Penang, both or either, or to Batavia only, to take on board a cargo for Europe. The special verdict, after stating the course of the ship's voyage from England to the Cape of Good Hope, to Hobart's Town, to George Town in Van Diemen's Land, and to Sydney in New Holland, found that she arrived at Sincapore on the 30th of March, 1825, where the risk intended to be insured against was to commence. It then stated the sailing *on the voyage homeward, and the total loss. And after setting out many particular instances of delay in the course of the voyage on the part of the captain, there is an express finding by the jury, "That there was unreasonable and unjustifiable delay between the making of the said policy of assurance and the commencement of the risk intended to be insured against."

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Upon this special verdict it has been argued before us on the part of defendant, that the unreasonable and unjustifiable delay on the part of the captain in completing the outward voyage on which he was then engaged, and commencing the homeward voyage on which the risk was intended to attach, discharged the underwriters from this policy; and we are of opinion that such unreasonable and unjustifiable delay on the part of the insured, in commencing the voyage insured against, is in the nature of a deviation, and does amount to such an alteration of the risk insured against, as to discharge the liability of the underwriters upon this policy.

That an unreasonable delay in commencing the voyage insured against, after the policy has actually attached, discharges the underwriter from the policy, appears, not only from the reason of the thing itself, but from the opinion of Lord KENYON in *Smith v. Surridge*.† In that case, the ship *Resolution* being insured "at and from Pelew to London," it was proved she remained a considerable time at Pelew to complete her repairs before she commenced her voyage. An objection was taken, that such delay avoided the policy; and Lord KENYON said, "If there was any unreasonable delay on the part of the insured,

† 6 R. R. 837 (4 Esp. 25).

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there was no doubt it would avoid the policy:" though he afterwards observed, "the delay in that case was not a voluntary delay, nor such as amounted to a discharge of the policy."

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Again, that an unreasonable delay in performing the voyage insured is equivalent to a deviation, was expressly ruled in the case of *Hartley v. Buggin*,[†] where a ship, insured "at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves," stayed several months beyond the usual stay of ships in that trade. The Court of King's Bench decided, this was equivalent to a deviation. And Lord MANSFIELD said, "The single point before the Court is, whether there has not been what is equivalent to a deviation, whether the risk has not been varied, no matter whether the risk has or has not been thereby increased."

The same principle is admitted in the cases of *Vallance v. Dewar*,[‡] and *Ougier v. Jennings*, in a note to that case;§ in both of which it is admitted, that a delay in the commencement of the risk, by the interposition of an intermediate voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters.

In the present case, at the time the policy was effected, the ship was then actually in the course of performing her outward voyage under her charter, and the risk upon the policy was not to commence until the outward voyage was completed by the arrival of the ship at Singapore. And it is argued by the assured, that although unjustifiable delay before commencing, or in performing the voyage itself which is insured, amounts to a deviation, no such delay in completing the outward voyage upon which the ship is then known to be engaged, will have the same consequences, inasmuch as with that voyage the policy in question has no concern.

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But if the principle above laid down be sound, where the delay takes place after the risk has actually commenced, in reason and sense it applies also to the case of the voyage insured, where the

[†] Park, 513.

§ 10 R. R. 739, n.

[‡] 10 R. R. 738 (1 Camp. 503).

risk is not to commence until the completion of the outward voyage.

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The reason upon which a deviation discharges the insurer, is not that the risk is thereby increased, but because the insured has, without necessity, substituted another voyage for that which was insured, and thereby varied the risk which the underwriter took upon himself. It must be admitted that, if the policy had been effected upon this ship at and from Singapore, the ship then being at Singapore, unreasonable and unjustifiable delay at Singapore would have avoided the policy. Why, but because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected.

But what is the difference with respect to the alteration of the voyage, whether this unreasonable and unjustifiable delay takes place in the course of the ship's voyage to Singapore, or after the ship is at Singapore? The underwriter has as much right to calculate upon the outward voyage, on which the ship is then engaged, being performed in a reasonable time, and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time, after the risk has attached. In either case the effect is the same, as to the underwriter, who has another risk substituted instead of that which he has insured against; and in both cases, the *alteration is occasioned by the wrongful act of the assured himself.

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But the principle contended for by the defendant seems to be established as law by the case of *Hull v. Cooper*.† In that case, Lord ELLENBOROUGH says, "When a broker proposes a policy to an underwriter, on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there." In that case, the question turned upon the point of concealment, the situation and circumstances of the ship being known to the assured, but not communicated to the underwriter. In the present

† 13 R. B. 287 (14 East, 479).

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case, it is true, no such question can arise, the assured, at the time the policy was effected, being ignorant of the precise place where the ship was, and of the misconduct of the captain. But the principle stated by Lord ELLENBOROUGH, in his judgment on that case, namely, that a delay in the arrival of the vessel at the place where the risk is to attach, alters the risk of the insurer, applies to the present case. And, as in the present case, the jury have expressly found that the delay before the ship arrived at the port where the policy was first to attach, was unreasonable and unjustifiable, we must intend that the risk was in fact varied, and, consequently, the underwriter is discharged from the policy.

We therefore give

Judgment for defendant.

1832.
Jan. 30.

MOUNT v. LARKINS.†

(TAXATION OF COSTS.)

[195]

(8 Bing. 195—197; S. C. 1 Moore & Scott, 357; 1 L. J. (N. S.) C. P. 89.)

Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness, from the time of subpoena to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not shew the permission of the Admiralty for him to engage in the merchant service.

THE questions tried in this cause were, the seaworthiness of the ship *Aguilar*, and whether a voyage on which she had been insured had been entered on without unreasonable delay.

The cause was appointed for trial on the 28th of October, 1829, but was not tried till the 22nd of April, 1830, when a verdict was found for the plaintiff; but a rule was obtained for a new trial on the question of seaworthiness, and a special case was argued on the question of unreasonable delay. Judgment upon the latter question having been given on the 25th of November, 1831, in favour of the defendant, (see *ante*, p. 631), it became unnecessary for him to proceed to a new trial.

Watson, the captain of the ship, had been subpoenaed by the defendant on the 6th of October, 1829, to give an account of the delay in the voyage, one of the points on which the defendant

† Cited and followed in judgment in *The Bahia* (1865) L. R. 1 A. & E. 15, 16.—R. C.

rested his case. And upon the taxation of costs the defendant claimed 219*l.* paid by him to Watson, for his subsistence from the 6th of October, 1829, to November 25, 1831, alleging, that Watson had been detained after the trial in April, 1830, to secure his attendance upon the new trial, for which a rule absolute had been obtained; and that in the beginning of 1831, he had refused an offer of employment in the merchant service in consequence of this detention.

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The plaintiff objected to the sum claimed for Watson, on the ground that he had not come from a place where he was out of the reach of a subpoena, but had, during the whole time in question, been living at Hackney; that he was an officer in the royal navy, receiving half-pay, and not allowed to engage in the merchant service without *express permission from the Admiralty; and that, though in attendance, he had not been examined on the trial of the cause.

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The prothonotary allowed 94*l.* for the expense of Watson's subsistence from October 6, 1829, to the time of the trial, April 22, 1830; whereupon, a rule was obtained on the part of the plaintiff to reduce that sum, and on the part of the defendant to increase it.

Taddy, Serjt. urged the reduction :

The defendant had no right to detain a witness for such a length of time at the expense of the other party, upon the mere speculation that the Court might order a new trial, especially when he was not examined on the first trial. And the witness here being a half-pay officer, and having the means of subsistence, was not entitled to any thing even for the time that elapsed before the trial. He cannot claim for loss of employment in the merchant service, since it is illegal for him to enter into that service without the express consent of the Admiralty. That distinguishes the present case from that of *Loneragan v. Royal Exchange Assurance*,† and *Berry v. Pratt*,‡ where the witness, by his attendance on the cause, was deprived of his only means of subsistence. The witness, too, might have been examined on interrogatories.

† 7 Bing. 723.

‡ 25 R. R. 396 (1 B. & C. 276).

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Wilde, Serjt., in support of the increase, relied on the affidavit stating the witness to be a material and necessary witness, and on the recent decisions of *Loneragan v. Royal Exchange* and *Berry v. Pratt*. According to the former of those cases, the party was not bound to examine upon interrogatories where the appearance of the witness at the trial was likely to be more beneficial. If *the party was justified in detaining the witness for the first trial, he was equally justified in detaining him for the second. The necessity for putting him into the box must depend upon the accidents of the trial; but that did not lessen the necessity for having him ready.

TINDAL, Ch. J. :

It seems to the Court that there is no sufficient reason for reviewing the prothonotary's taxation on the one side or the other. As to the motion to reduce the sum allowed the witness, or to refuse him any thing, there is no reason for doubting that he was a material witness,—(a point upon which the Court ought not to speculate too nicely, when there is a fair and reasonable ground for coming to such a conclusion,)—and if so, the prothonotary is the proper officer to determine the *quantum* of allowance. In the case of *Berry v. Pratt*, the Court of King's Bench confirmed an allowance for the subsistence of a common mariner; and although the witness here was a master in the royal navy, he was in the habit of obtaining employment in the merchant service, and his case cannot be distinguished from that of the mariner. On the other hand, we see no reason for increasing the sum which has been allowed. It has been contended, that it was necessary to detain him till the result of a motion for a new trial should be known; but very early in that proceeding the Court intimated that the new trial should be confined to the question of seaworthiness, a point to which the defendant did not propose to examine the witness. There is no ground, therefore, for sending the case back to the prothonotary; and the circumstance that both parties complain on opposite grounds, is, in some degree, an indirect proof that the prothonotary is right.

Rule discharged.

FREEMAN v. TAYLOR.†

(8 Bing. 124—139; S. C. 1 Moore & Scott, 182; 1 L. J. (N. S.) C. P. 26.)

The plaintiff, owner and captain of a ship, agreed by charter-party to proceed to the Cape, and having delivered goods there, to proceed with all convenient speed to Bombay, where the freighter engaged to put on board a cargo of cotton for England. The plaintiff was to have the cabins and between decks for his own benefit. Plaintiff arrived at the Cape, and might have proceeded on his voyage in two days, but he remained there ten, taking in cattle for the Mauritius on his own account: he went round by the Mauritius in his way to Bombay, and arrived at the latter place six weeks later than he would have done if he had proceeded thither direct. Other ships had arrived in the mean time. The freighter refused to load; and in an action on the charter-party, the jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of the contract; and a verdict being found for the defendant, a new trial was refused.

THE declaration stated, that by a certain charter-party of affreightment made between the plaintiff, therein described as owner of the ship or vessel called *The Edward Lombe*, of the burthen of 847 tons' registered measurement, or thereabouts, whereof the plaintiff was commander, then lying in the port of London, of the one part, and the defendant, therein described as freighter of the said ship, of the other part, it was witnessed that the said owner, for the consideration thereafter mentioned, did thereby promise and agree with and to the said freighter, his executors, administrators, and assigns, that the said ship,—being tight, staunch, and strong, and every way properly fitted, victualled, and manned, as was usual for vessels in the merchant service, and for the voyage thereafter named,—the commander of the said ship, or some other proper person in his stead, should and would receive and take on board the said ship in the West India Dock in the aforesaid port of London, such quantity of lawful merchandize as the said freighter might think proper to ship, not exceeding what the said ship would reasonably stow and carry in the lower hold, reserving sufficient space for fifteen chaldrons of coals, which the owner was allowed to stow therein on his own account; the *cabins and between decks of the vessel

1831.
Nov. 25.

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† Cited by BYLES, J. in *McAndrew v. Chapple* (1866) L. R. 1 C. P. 643, 648, 35 L. J. C. P. 281, 285; by BOVILL, J. in *Stanton v. Richardson* (1872) L. R. 7 C. P. 421, 433 (affirmed in Ex. Ch.

L. R. 9 C. P. 390); and in the judgment delivered in the Exchequer Chamber in *Jackson v. Union Marine Ins. Co.* (1874) L. R. 10 C. P. 125, 133, 148, 44 L. J. C. P. 27, 32, 36.—R. C.

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being also reserved for the benefit of the owner and commander ; and that having received the same on board, and being despatched therewith not later than the 20th day of May then next ensuing, the said commander, or some other proper person in his stead, should and would, wind and weather permitting, set sail and proceed with the said vessel to Madeira and the Cape of Good Hope, where having discharged or disembarked any goods or passengers destined for those places, she should, with all convenient speed, proceed to Bombay, and being arrived there, or so near thereto as the said ship could safely get, and being ready to discharge the aforesaid goods, the said commander, or some other proper person in his stead, should and would give immediate notice thereof to the correspondents or assigns of the said freighter at Bombay aforesaid, and should make a right and true delivery of the whole of the said outward goods, excepting such goods, if any, as should have been shipped by the agents of the said freighter at the Cape of Good Hope for Bombay and London, as thereafter provided for, freight free, and agreeably to bills of lading which should have been signed for the same ; and that having completed such delivery, the said commander, or some other proper person as aforesaid, should and would receive and take on board the said ship such a quantity of cotton and other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage, and no more, as would not exceed in the whole, including any goods shipped at the Cape of Good Hope for Bombay and London, if any should have been so laden, what the said vessel could reasonably stow and carry in the lower hold, the space occupied by the fifteen chaldrons of coals on the outward voyage being again reserved on the homeward bound voyage, *estimating the said space as equal to thirty-six pipes of wine or eighteen tons of measurement goods, together with the cabins and between decks, for the benefit of the said owner ; and that having received the said goods on board, and completed the loading of the between decks, the said commander, or some other proper person as aforesaid, should and would, wind and weather permitting, set sail and proceed with the said vessel to the Cape of Good Hope, and thence to London, or direct to London, as the case might be ; and having arrived

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at London, the said commander, or some other proper person as aforesaid, should and would make a right and true delivery of the said homeward cargo in the West India or London Docks, as directed by the said freighter, agreeably to bills of lading which should have been signed for the same, and there end the said intended voyage; the acts of God, the King's enemies, restraints of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted: And the said owner did thereby further agree with and to the said freighter, his executors, administrators, and assigns, that the said ship should lie in the port of London aforesaid for receiving the said outward goods until the 20th day of May then next ensuing, if required by the said freighter, and at Bombay, for delivering the said outward goods, and receiving on board the said homeward cargo, and at the Cape of Good Hope, in case the said ship should call there on her homeward voyage, for the purpose of the said freighter, as thereafter provided, for the space of fifty running days in the whole, if not sooner despatched, such lay days to commence and be accounted from the days on which the said ship should respectively be ready to discharge the said goods at Bombay and the Cape of Good Hope aforesaid, and *notice thereof should be given as aforesaid; and the said owner also agreed to provide sufficient ballast for the said vessel at Bombay, in case the correspondents of the said freighter should not provide any or sufficient heavy or dead weight goods for that purpose; and also that the said ship should be addressed to the correspondents of the said freighter at Bombay aforesaid, who were to be allowed the usual commission upon all freight or passengers procured by them for the benefit of the said owner in the between decks and cabins: in consideration whereof and of every thing thereinbefore mentioned, the said freighter did therefore for himself, his executors, administrators, and assigns, promise and agree with and to the said owner, his executors, administrators, and assigns, that he the said freighter, his executors, administrators, correspondents, or assigns, some or one of them, should and would, at his and their own costs, expense, and risk, send alongside the said ship in the aforesaid port of London such quantity of lawful goods

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as he might think fit to load, not exceeding as aforesaid, in sufficient time to enable the said ship to clear outwards at that port on or before the 20th day of May then next ensuing, and receive the same from alongside the said ship at Bombay as aforesaid, and at their or his like costs, expenses, and risks, send alongside the said ship at Bombay as aforesaid such quantity of cotton and other lawful goods, both or either, as should be sufficient to load the lower hold of the said vessel, together with a sufficient quantity of goods to fill up the broken stowage, and no more,—the space occupied therein by the fifteen chaldrons of coals on the outward voyage, estimating the said space as equal to thirty-six pipes of wine, or eighteen tons of measurement goods, being again reserved on the homeward voyage for the benefit of the said owner as aforesaid,—and despatch *her therewith to London, or to the Cape of Good Hope and London, within the days thereinbefore limited for those purposes, or days of demurrage thereafter granted; and in like manner receive the said homeward cargo in the port of London with all possible despatch; and should and would well and truly pay or cause to be paid unto the said owner, his executors, administrators, and assigns, in full for the freight of the lower hold of the said ship for the said voyage out and home, and including the freight of all goods discharged and reladen at the Cape of Good Hope as therein stipulated, at and after the rate of 7*l.* sterling money of Great Britain per ton for each and every ton stowed in the lower hold when the ship was despatched from Bombay, or by the said charter-party engaged to be provided for stowing therein,—always excepting the freight of the space reserved for stowage of thirty-six pipes of wine or eighteen tons of measurement goods for owner's account,—such freight to be paid as follows: 300*l.* part thereof, deducting two months' interest at the rate of 5*l.* per cent. per annum in cash in London, to be paid on the day on which the said vessel should clear outwards at the aforesaid port of London; 350*l.* further part thereof by the acceptance of the said freighter at two months' date from the same day; and the remainder on a right and true discharge of the said goods, by a good and approved bill payable in London at two months' date from the day on which the said ship should report inwards at

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the custom-house, London, after deducting such monies as might have been advanced to the commander of the said vessel by the correspondents of the said freighter at Bombay aforesaid, together with the premium of insurance to be effected by the said freighter on freight to the amount of such last-mentioned advance :

And the plaintiff, in fact, said, that the said ship *being tight, staunch, and strong, and every way properly victualled and manned, as was usual for vessels in the merchants' service, and for the voyage in the said charter-party named, the plaintiff, as commander of the said ship, did afterwards, to wit, on, &c. at, &c. take on board the said ship in the West India Docks, in the said port of London, such quantity of lawful merchandize as the defendant thought proper to ship in the lower hold ; and having received the same on board, the said ship was afterwards, to wit, &c. at, &c. despatched therewith, and the said plaintiff then and there set sail and proceeded with the said vessel, with the said goods so on board thereof as aforesaid, to Madeira and the Cape of Good Hope, &c., and afterwards, to wit, on, &c., at, &c. arrived at Madeira and the Cape of Good Hope, and then and there discharged and disembarked all the goods and passengers destined for those ports, to wit, at, &c. ; and did afterwards, to wit, on, &c. at, &c. proceed with all convenient speed to Bombay ; and did afterwards, to wit, on, &c. at, &c. arrive at Bombay aforesaid ; and the said ship was then and there addressed to the correspondents of the said freighter at Bombay aforesaid, and the said plaintiff was then and there ready to discharge the said goods from the said ship, and did then and there give immediate notice thereof to the correspondents and assigns of the said defendant at Bombay aforesaid, to wit, at, &c., and did then and there make a right and true delivery of the whole of the said outward bound goods, except such goods as were shipped by the agents of the said defendant at the Cape of Good Hope for Bombay and London, freight free, and agreeably to bills of lading which had been signed for the same, according to the terms of the said charter-party, to wit, at, &c. ; and having completed such delivery, the said plaintiff was then and there ready to receive and take on board *in the lower hold of the said ship at Bombay aforesaid from the said freighter, his correspondents or assigns, all such quantity

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of cotton or other lawful goods, both or either, together with a sufficient quantity of goods to fill up the broken stowage as the said freighter, his correspondents or assigns, at Bombay aforesaid, should think fit to ship and load on board of the said ship; of all which said several premises the said defendant afterwards, to wit, on, &c. at, &c. had notice; yet the said defendant, not regarding his said promise and undertaking, but contriving and fraudulently intending to deceive and defraud the said plaintiff in that behalf, did not, nor would within the said lay days or days of demurrage in the said charter-party mentioned, or either of them, nor did nor would any other person or persons in his behalf, at his or their costs, expense, and risk, send alongside the said ship at Bombay aforesaid such a quantity of cotton or other lawful goods, together with a sufficient quantity of goods to fill up the broken stowage, as would have been sufficient to have loaded the lower hold of the said ship, excepting the space so reserved for the benefit of the owner and commander as aforesaid, or any quantity of cotton or other goods, or any goods for broken stowage whatsoever, but wholly neglected and refused so to do, and otherwise wholly failed and made default, to wit, at, &c.; by means of which said several premises, the plaintiff not only lost and was deprived of all the profit and advantage which he might and otherwise would have made by the freight and primage of the said homeward bound cargo, amounting to a large sum of money, to wit, the sum of 3,000*l.*, but was also put to great charges and expenses in and about endeavouring to procure and procuring another freight for his said ship for her homeward voyage, amounting to a further large sum of money, to wit, the sum of 500*l.*; and also, *by reason of the premises, the said ship or vessel of the plaintiff was kept and detained at Bombay aforesaid divers, to wit, fifty days longer than she otherwise would have been detained at Bombay aforesaid, whereby the plaintiff was not only hindered and prevented from taking divers, to wit, fifty passengers in the said cabins and between decks in the said homeward voyage, which he might and otherwise would have taken, and thereby lost and was deprived of divers great gains and profits, which he might and otherwise would have made thereby, amounting to a further large sum of money, to

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wit, the further sum of 1,000*l.*, but was also forced and obliged to pay, lay out, and expend a large sum of money, to wit, the sum of 200*l.*, in and about maintaining, provisioning, and paying the crew of the said ship during the said fifty days, to wit, at, &c.

The defendant pleaded the general issue.

At the trial before Tindal, Ch. J., London sittings after Trinity Term, 1880, it appeared that the ship sailed from London on the 20th of May, 1828, with a cargo shipped by the defendant for Bombay, and arrived at the Cape of Good Hope on the 28th of September following. She might have proceeded on her voyage on the 30th, but the captain detained her till the 8th of October, being occupied in stowing the between decks, on his own account, with a cargo of mules and cattle for the Mauritius. On the 4th of October, the defendant's agents at the Cape protested against the delay, and against the ship's going to the Mauritius, on the ground that it was out of her course. The captain, however, insisted that it was not out of the course, nor any violation of the terms of the charter-party. He proceeded accordingly; arrived at the Mauritius on the 10th of November; and remained there till the 19th, discharging his mules and cattle. On the 19th he sailed for Bombay, where he *arrived on the 9th of January, 1829; six or seven weeks later than he would have arrived, if, on the 28th of September, he had sailed direct from the Cape of Good Hope to Bombay. In the mean time several ships had arrived at Bombay which left England subsequently to *The Edward Lombe*; and the defendant's agents refused to procure a cargo of cotton to freight that ship back. The captain remained at Bombay till the 17th of March, during which time he took on board, on his own account, whatever goods he could procure, and then proceeded to Ceylon for further cargo, with which he returned to London.

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The plaintiff by this action sought to recover the difference in value between the freight so earned and that which would have accrued from the defendant's cargo of cotton. The freight for the voyage out had been paid, partly in advance.

The CHIEF JUSTICE told the jury, that inasmuch as the freighter might bring his action against the owner, and recover damages for any ordinary deviation, he could not, for such a deviation,

FREEMAN : put an end to the contract : but if the deviation was so long and
 TAYLOR. unreasonable that, in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view in chartering the ship, in that case the contract might be considered at an end ; and he left it to the jury to decide, whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he entered into the contract.

The jury found for the defendant.

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Taddy, Serjt. obtained a rule *nisi* to set aside the verdict, on the ground that the defendant's remedy for the alleged deviation, if he had been injured by it, was *by cross action ; and that he was not at liberty, in the exercise of his own discretion, to put an end to the contract between him and the plaintiff. The engagement to sail from the Cape with all reasonable speed was not a condition precedent, but an independent covenant, for the breach of which the defendant might be entitled to sue ; it did not go to the whole of the consideration for the defendant's contract, as was manifest from the circumstance that the defendant had not shewn that his object in hiring the ship had been defeated by the plaintiff's delay. Unless it went to the whole consideration, it was not a condition precedent, the neglect of which would entitle the defendant to determine the contract. In *Bornmann v. Tooke*,† by a charter-party between the plaintiff, the captain of a ship, and the defendant's agent abroad, for the carriage of timber from Riga to Portsmouth, at a stipulated rate per load, the former bound himself, after receiving his cargo on board, to sail with the first favourable wind direct to the port of Portsmouth. The ship, however, unnecessarily entered the harbour of Copenhagen, where she was detained several weeks, by means whereof the defendant was put to considerable expense in having fresh insurances done upon her cargo. In an action of *indebitatus assumpsit* for the freight, it was held that the plaintiff's covenant to sail direct to Portsmouth was not a condition precedent ; and that the deviation could not be given in evidence, either as a bar to the action or to diminish the damages.

† 10 R. R. 707 (1 Camp. 377).

So, in *Havelocke v. Geddes*,† it was held that a covenant in a charter-party of affreightment that the owner should at his expense forthwith make the ship tight and strong, &c. for a voyage for twelve months, &c., and keep her so, was *not a condition precedent to the recovery of the freight, after the freighter had taken the ship into his service and used her for a certain period; but if the freighter should be afterwards delayed or injured by the necessity of repairing her, he would have his remedy in damages. And in *Davidson v. Gwynne*,‡ where the master of a vessel covenanted with the freighter (*inter alia*) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents, and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same, and then take in a home cargo, and return and make a right and true delivery thereof at London, &c., in consideration whereof, and of every thing above mentioned, the freighter covenanted (*inter alia*) to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo at London; it was held, that the master having proceeded with the outward cargo to Lisbon, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for the voyage, though he had not sailed with the first convoy; the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed, but a distinct covenant for the breach of which he was liable in damages.

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Wilde and Bompas, Serjts. shewed cause :

The verdict of the jury, coupled with the previous direction, amounts to a finding that the object of the charterer's contract was entirely defeated by the unjustifiable delay of the plaintiff: *it follows, therefore, that the engagement to proceed from the Cape with all reasonable speed was a condition precedent, going to the entire consideration for the contract; and as such, while the contract remained executory, the breach of it was an answer

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† 10 R. R. 380 (10 East, 555).

‡ 11 R. R. 420 (12 East, 381).

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to the plaintiff's demand: *Boone v. Eyre*,[†] *Duke of St. Albans v. Shore*.[‡] The plaintiff having by his wilful act defeated the object of the defendant, has no longer any claim against him. Thus, in *Soames v. Lonergan*,[§] where the charterers of a ship for a voyage from Cadiz to St. Blas, and thence to Guayaquil, to take in a homeward cargo, caused another ship to be chartered on their account to go out in ballast and bring home a cargo from Guayaquil, with a proviso that in the event of the non-arrival of the first-mentioned ship at Guayaquil, then the second charter should be void: it was held, that "non-arrival" meant non-arrival within such time as might answer the purposes of the charter of the second ship; and that the first ship not having arrived in time to answer those purposes, and the delay not having been attributable to the charterers, the charter of the second ship was void, and the charterers were not bound to provide a homeward cargo for her. In *Touteng v. Hubbard*,^{||} where a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes, the ship having been prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British Government, it was held the Swedish owner could not, by proceeding on the voyage after the embargo was taken off, entitle himself to recover the freight against the British merchant.

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So in *Shadforth v. Higgin*,[¶] where a ship was freighted to go in ballast to Jamaica, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the July convoy, provided she arrived out and was ready by the 25th of June; it was held, that as she did not arrive out till after the 25th of June, the freighter was entirely discharged from his contract to furnish a cargo.

In the cases relied on for the plaintiff, either the stipulation was no condition precedent, or it did not appear, as in the present case, that the party had been deprived of the benefit of

[†] 2 W. Bl. 1312.

[‡] 1 H. Bl. 270.

[§] 26 B. R. 460 (2 B. & C. 564).

^{||} 6 B. R. 791 (3 Bos. & P. 291).

[¶] 3 Camp. 335.

the contract. Thus, in *Bornmann v. Tooke*, there was no finding that the object of the defendant had been defeated. In *Havelock v. Geddes* the defendant made use of the ship, and thereby waived the right of insisting on seaworthiness as a condition precedent. In *Davidson v. Gwynne* the benefit of the voyage was obtained although the ship did not sail, according to agreement, with the first convoy. Whether or not a stipulation shall operate as a condition precedent, and goes to the entire consideration, depends, says Lord ELLENBOROUGH, not on any formal arrangement of the words, but on the sense and reason of the thing, as it is to be collected from the whole contract: *Ritchie v. Atkinson*;† and on that principle all the cases may be reconciled: *Thomas v. Cadwallader*,‡ *Goodisson v. Nunn*,§ *Porter v. Shephard*,|| *Campbell v. Jones*,¶ *Cook v. Jennings*,†† *Glazebrooke v. Woodrow*,‡‡ *Smith v. Wilson*,§§ *Storer v. Gordon*,||| *Fothergill v. Walton*.¶¶ *Com. Dig. Condition Precedent, (G 5) is express that it ought to be performed within a reasonable time.

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Taddy:

The defendant having had the benefit of the outward voyage, and having adduced no proof of loss occasioned by the late arrival of the ship at Bombay, it was not competent to the jury to find that the whole object of the contract was defeated. In *Touteng v. Hubbard*, *Soames v. Lonergan*, and *Shadforth v. Higgin*, nothing was done for the benefit of the charterer on the outward voyage; the ships went out in ballast. And in *Havelock v. Geddes* Lord ELLENBOROUGH said, “Had the plaintiff’s neglect precluded the defendants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted upon as an entire bar; but as the defendants have had some use of the vessel, notwithstanding the plaintiff’s neglect, the plaintiff’s covenant is to be considered as going to a part only; the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely

† 10 R. R. 307 (10 East, 295).

‡ Willes, 496.

§ 4 T. R. 761.

|| 3 R. R. 305 (6 T. R. 665).

¶ 3 R. R. 263 (6 T. R. 570).

†† 4 R. R. 468 (7 T. R. 381).

‡‡ 4 R. R. 700 (8 T. R. 366).

§§ 8 East, 437.

||| 15 R. R. 499 (3 M. & S. 308).

¶¶ 20 R. R. 367 (8 Taunt. 576).

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gives the defendants a right under a counter-action to such damages as they can prove they have sustained from such neglect."

(TINDAL, Ch. J.: The plaintiff here has been paid for the outward voyage.)

Still *Bornmann v. Tooke* and *Constable v. Cloberie*[†] are express authorities to shew that the stipulation here as to proceeding direct to Bombay was not a condition precedent. *Goodisson v. Nunn*, *Glazebrook v. Woodrow*, and *Kingston v. Preston*,[‡] there cited, were all cases of sale and purchase, involving concurrent conditions, which could not be pleaded one against the other, and inapplicable to the present case; but *Campbell v. Jones*[§] is in point for the plaintiff. There A., in *consideration of 250*l.* paid by B., and of the further sum of 250*l.* to be paid, &c., covenanted that he would, with all possible expedition, instruct B. in a certain mode of bleaching linen (for which he had obtained a patent); and B. covenanted that he would, on or before the 25th of February, 1794, or sooner, if A. should before that time have instructed him, &c. pay the further sum of 250*l.*; it was held, that the covenants of A. and B. were independent covenants; and that A. might sue B. for the 250*l.* without averring that he had taught B. the mode of bleaching linen, &c.

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Cur. adv. vult.

TINDAL, Ch. J.:

This was an action of assumpsit, upon a charter by the plaintiff to the defendant of the ship *Eduard Lombe*, from London to Madeira and the Cape of Good Hope, and thence to Bombay and back; the plaintiff claiming a compensation in damages against the defendant for not loading the ship with a cargo of cotton at Bombay.

At the trial it appeared in evidence, that, instead of proceeding by the direct and usual course from the Cape of Good Hope to Bombay, the captain made a deviation to the island of Mauritius; and that the defendant's agents at Bombay, in consequence of such deviation, refused to find a cargo.

[†] Palm. 397.

Dougl. 689.

[‡] Cited at large in *Jones v. Barkley*,

§ 3 R. R. 263 (6 T. R. 570).

The point left to the jury at the trial was, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; the jury being told that if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo.

The jury having determined that question in the affirmative, and having found a verdict for the defendant, a motion was made to set the verdict aside, and for a new trial, on the ground of misdirection.

But, after hearing the arguments against and in support of the rule, we are of opinion, upon the same principle as that which was laid down in the case of *Mount v. Larkins*,† and which we therefore think it is unnecessary to repeat, that the direction was right; and we therefore think the rule for a new trial must be discharged.

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Rule discharged.

COMBE AND OTHERS v. WOOLF.‡

(8 Bing. 136—164; S. C. 1 Moore & Scott, 241; 1 L. J. (N. S.) C. P. 57.)

Defendant guaranteed the payment of porter to be delivered by plaintiff to J.: the guaranty contained no stipulation as to the credit to be given to J. The custom of the plaintiff was to give six months, and then, sometimes, to take a bill at two. The plaintiff having, without the knowledge of the defendant, given J. eleven months' credit: Held, that the defendant was discharged from his guaranty.

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THE declaration stated that on the 23rd of May, 1827, at Westminster, by a certain memorandum or undertaking made and given by the defendant to the plaintiffs, the defendant guaranteed and engaged to see the plaintiffs paid for any porter which the plaintiffs might send to one Abraham Joseph of the town of Penzance, until the plaintiffs should receive notice to the contrary from the defendant. And the said memorandum

† *Ante*, p. 631.

‡ Cited by DENMAN, J. in his judgment in the Common Pleas in *Croydon Commercial Gas Co. v. Dickinson* (1876) 1 C. P. D. 707, 718, 45 L. J. C. P. 869, 873. The judgment of the Common

Pleas was affirmed by the Court of Appeal on the point of giving time, though reversed upon a question of the contract being severable (1876) 2 C. P. D. 46, 46 L. J. C. P. 157.—R. C.

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or undertaking being so made as aforesaid, to wit, at, &c., in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil the terms of the said memorandum or undertaking in all things on their part and behalf to be performed and fulfilled, the defendant undertook, and then and there faithfully promised the plaintiffs to perform and fulfil the terms of the said memorandum or undertaking in all things on his part and behalf to be performed and fulfilled. The plaintiffs then averred that they, confiding in the said undertaking of the defendant, did afterwards, to wit, on, &c., sell, send, and deliver to the said Abraham Joseph certain porter of great value, which the said Abraham Joseph had occasion for and required of the plaintiffs, and at and for certain reasonable prices then and there agreed upon by and between the plaintiffs and Abraham Joseph, amounting in the whole to a large sum of money, to wit, 150*l.*: and although the said Abraham Joseph was, on 1st of April, 1881, at, &c., requested by the plaintiffs to pay the said sum of money, yet the said Abraham *Joseph had not as yet paid said sum of 150*l.* or any part thereof, but had hitherto wholly neglected and refused so to do; of all which said premises the defendant on the day and year last aforesaid, had notice; yet the defendant had not as yet paid the plaintiffs the said sum of money or any part thereof for the said porter or any part thereof, but still neglected and refused so to do, and said sum of 150*l.* still remained due and unpaid.

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At the trial before Park, J., Middlesex sittings in last Michaelmas Term, it appeared that the defendant had executed the following guaranty to the plaintiffs, who were brewers:

“PENZANCE, May 28, 1827.

“Messrs. Combe, Delafield, & Co.

“I hereby guarantee and engage to see you paid for any porter you may send Mr. Abraham Joseph of this town, until you receive notice to the contrary from me.

“LEMAN WOOLF.”

According to the invoices, the course of the plaintiffs' business

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was to give six months' credit, or cash $2\frac{1}{2}$ discount; and it was their custom to extend the credit by taking at the end of the six months a two months' bill. Casks charged in the invoice, but allowed for if returned. After the guaranty had been given, the plaintiffs furnished Joseph with porter from time to time; and on the 1st of December, 1829, there was a balance due of 45*l.* for that article. The plaintiffs applied to Joseph in June, 1830, for the amount, and again in August, when, failing to obtain it, they threatened Joseph on the 29th of September that they would proceed against the defendant; upon which Joseph sent them his promissory note, dated 4th of October, payable two months after date. On the 18th of November, Joseph became bankrupt, whereupon this action was brought against his guaratee.

The plaintiffs also claimed 17*l.* 5*s.* for casks not returned; but these, though furnished subsequently to the defendant's guaranty, were not the identical casks which had contained the porter in respect of which this action was brought. It was left to the jury to say whether the course of dealing between the parties had been altered, and time had been given to the debtor.

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The jury found that the course of dealing, prescribed by the invoices, had been altered, but that, as practical men, they thought the credit to Joseph had not been extended; whereupon the verdict was found for the plaintiffs, with leave for the defendant to move to set it aside, on the ground that he had been discharged by the time granted to Joseph, and that, at all events, he was not liable for the casks, having guaranteed only the porter furnished to Joseph.

Wilde, Serjt. having obtained a rule *nisi* accordingly,

Taddy, Serjt. shewed cause :

The defendant not having stipulated by his guaranty that the credit to Joseph should be limited to any particular time, is not discharged by the indulgence which has been given. It has, indeed, been established in courts of equity, that if a creditor give time to his debtor, he cannot sue the surety till that time is expired. But the surety is not discharged entirely; his liability is only suspended, and revives when the period of indulgence has

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expired. Thus, in *The London Assurance Company v. Buckle*,† where a bond was executed by an insurance broker, as the principal obligor, and two sureties, with a condition, that if they should pay the obligees such premiums as should become due for assurances on ships at sea, to be made with the obligees by the insurance broker, within six months after the making of the insurances, *the bond was to be void: the broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums, and they received a dividend of six shillings in the pound under the commission: the premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy: but it was held, that the sureties were not discharged by the *laches* of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. So, in *Goring v. Edmonds*,‡ in April, 1825, defendant guaranteed the payment of money due from his son to the plaintiff upon a sale of timber: the plaintiff received part payment of the son, and made repeated unsuccessful applications to him for the residue till December, 1817, when the son became bankrupt: the plaintiff never disclosed to the defendant the issue of these applications; but in December, 1827, sued him on his guaranty: it was held, that the defendant was not discharged by the time that had elapsed, nor by want of notice of the applications made to his son.

It is true, the creditor must conduct himself towards his debtor in the same way as he would have done if the guaranty had not been given; for if he conduct himself otherwise it is a fraud on the surety: thus in *English v. Darley*,§ the indorsee of a bill, having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was holden to be thereby precluded from afterwards suing the indorser. But if the creditor merely extend the credit given, the surety is still liable when the credit is at an end. And he is not injured by the indulgence shewn to the debtor.

† 4 Moore, 153.

§ 5 R. R. 543 (2 Bos. & P. 61).

‡ 31 R. R. 358 (6 Bing. 94).

In *Bastow v. Bennett*† there was, in effect, a fraud upon the surety. But upon the guaranty in this case there was no previous dealing, nor any stipulation to limit the credit given to the debtor.

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And the defendant's guaranty extends to the casks as well as the porter. One who guarantees the expense of liquors necessarily guarantees the vessels in which they are contained, as an inseparable accessory; just as one who contracts to admit another to the opera, contracts by implication to admit with him the clothes he wears on his back.

Wilde, Serjt., *contra*, was stopped by the Court.

TINDAL, Ch. J. :

This rule must be made absolute. The case presents two subjects for our consideration: the demand for 45*l.* in respect of porter furnished by the plaintiffs to Joseph, and the demand for 17*l.*, the value of casks, which had contained, not the porter in question, but porter furnished at some other time.

As to the demand for 45*l.*, we think the defendant was discharged from his guaranty by the plaintiffs giving time to Joseph, the indulgence never having been assented to by the defendant. It is clear from the evidence that time was so given. The course of the plaintiffs' business was to give credit for six months, or allow 2½ per cent. discount for cash. This credit was sometimes extended by a bill at two months. In the present instance the plaintiffs allow three months to elapse after the six, and are then paid by a note at two; thus virtually giving a credit of eleven months; and this, not as a matter of favour which they might afterwards repudiate, but as a right on which Joseph might insist, for after the receipt of the note, payment could no longer be demanded till it had run its time.

The surety, therefore, is exonerated on this general principle, that the plaintiffs have, without his assent, altered the situation in which he had a right to expect he should be placed when he gave the guaranty.

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It has been contended, that though the surety has sometimes, under such circumstances, been held to be discharged in equity,

† 3 Camp. 220.

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such is not the rule in courts of law. But except where a surety has entered into a bond for payment in default of the principal debtor, courts of law, as well as courts of equity, have always held the surety to be discharged where, without his assent, time has been given to the principal debtor. Where the surety has entered into such a bond, and by a parol agreement time has been given to the principal debtor, the surety is compelled to resort to a court of equity because by the rules of law a parol agreement cannot be pleaded in discharge of an instrument under seal.[†]

In the present case, although no specific time of payment is fixed by the guaranty, yet it must be implied that the guaranty was given on the supposition that the debtor would not have more than the usual credit.

But how, it is said, is the situation of the surety altered by this? At the end of eight months he had a right to enquire whether the debt due to the plaintiffs had been discharged, and if he found it still due, to take his measures against the debtor accordingly; whereas if the creditor could, without his assent, extend the credit to an unlimited time, the surety might be deprived of all remedy by the subsequent insolvency of the debtor; a danger to which he would equally be exposed, although he should be remitted to his right *against the debtor, provided the creditor forbore to sue till the extended term had expired.

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With respect to the casks, if the action had been brought for the identical casks in which the porter had been contained, perhaps they might be considered as accessory, and falling within the same rule as the principal demand; but as the casks in question were furnished on a different occasion, they are not within the meaning of the guaranty, and, at all events, are not within the terms of the declaration.

PARK, J. :

I agree that this rule must be made absolute. In coming to this decision we do not infringe on the cases which have decided

[†] This passage of the judgment of TINDAL, Ch. J. is cited by KAY, L. J. in his judgment in *Rouse v. Bradford Banking Co.*, '94, 2 Ch. 32, 63 L. J. Ch. 337, 350, 70 L. T. 427. In that case,

however, the Court of Appeal on special grounds, and the House of Lords on other grounds ('94, A. C. 586, 63 L. J. Ch. 890, 71 L. T. 522) held that the surety was not discharged.—R. C.

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that mere *laches* on the part of the creditor will not discharge the surety. The distinction taken in all the cases is between mere *laches*, or omission to press the debtor, and giving him a right to farther time. As in *English v. Darley*, where the indorsee of a bill having sued the acceptor to judgment, and taken out execution, received of him a sum of money in part payment, and took his security for the remainder, with the exception of a nominal sum only; he was held to be precluded from afterwards suing the indorser. In *Orme v. Young*† it was contended that the surety should have had notice of the creditor's abstaining to proceed; but GIBBS, Ch. J. held that the mere want of notice did not discharge the surety, and said, "What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; not exacting the money at the time; but it is the act of the creditor, depriving himself of the power of suing by something obligatory, which prevents the surety from coming into a court of equity for relief; because, the principal having tied his *own hands, the surety cannot release them. Here there is no contract to forbear; no impediment to the suit. A neglect to give notice to the surety that the debtor has made default, does not discharge him." In the present case there was a positive prevention of any suit by the principal creditor; for when he had tied up his own hands for months, the surety could make no claim at the expiration of the usual time; and it is by the risk that the debtor may become insolvent in the intermediate time, that the surety is injured.

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As for the casks, if the defendant were liable at all, I think he would be liable for the casks also, supposing the porter in question to have been contained in them; but these were sent at a different time, and are neither mentioned in the guaranty nor in the special count.

BOSANQUET, J. :

The rule must be absolute. Although the surety has not stipulated for any particular credit, the course of dealing between the plaintiffs and their debtor was altered, and the usual time of

† 17 R. R. 611 (Holt, N. P. 84).

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credit extended. It is admitted that the surety could not be sued during the time of the extended credit, which has been given without any notice to him, but it is contended that his liability revives after the extended credit has expired. But how is the claim against the surety supposed to be suspended? not by agreement between the parties but by operation of law; in other words, if an action were brought against him during the extended time, the indulgence given would be a bar to the action. If, however, it would, under such circumstances, be a bar at any time, it is a bar for ever, although the case would be very different if the action had been suspended by agreement. It has been urged that the surety is not injured by the indulgence shewn to the debtor. But he may be materially injured if the circumstances of the debtor decline during the time of the extended credit: the surety, *who might have been reimbursed at the earlier period, may be without remedy at the later.

As to the 17*l.* claimed for the casks, I think the plaintiffs are not entitled to recover it at the hands of the defendant. It seems there was a distinct course of dealing with respect to the porter and with respect to the casks; it may be doubted, therefore, whether a guaranty which mentions porter only can be applied to casks; but whether that be so or not it was at least incumbent on the plaintiff to state in alleging the breach of contract, that the casks were not returned; this he has altogether omitted, and therefore is not entitled to recover.

ALDERSON, J. :

I am of the same opinion. The first question has been decided by the case of *Orme v. Young*, and the principle there laid down. Delay on the part of the creditor is no discharge to the surety, but the creditor's binding himself down not to sue the debtor is a discharge for all time as well as for the period during which indulgence is extended to the debtor.

As to the question touching the casks, on which I entertain some doubt, it is sufficient to say that the demand in the declaration does not apply to them.

Rule absolute.

SELBY v. HILLS.

(8 Bing. 166—169; S. C. 1 Moore & Scott, 253; 1 L. J. (N. S.) C. P. 55; 1 Dowl. P. C. 257.)

1832.
Jan. 24.
[166]

A petitioning creditor attending commissioners of bankrupt, is protected from arrest, *eundo morando et redeundo*.

If he shews that he is on his way home, it is for the party who arrests to prove a deviation.

GOULBURN, Serjt., obtained a rule *nisi* to discharge the defendant out of custody, upon an affidavit that a commission of bankrupt having been issued at his instance, he, as petitioning creditor, attended the Court of Commissioners in Basinghall Street on the 30th of December to propose himself as an assignee, and to watch the proceedings; that he set off to return to his home (Beckenham in Kent) when the proceedings of the day concluded, and that he was arrested at the suit of the plaintiff as soon as he had crossed London Bridge.

Jones, Serjt. shewed cause, on an affidavit that the defendant was not arrested till two hours after he had left the Commissioners' Court, nor till after he had called at several places in the City and Westminster, which were in a direction opposite to his residence. Upon which *Jones* contended, first, that a petitioning creditor attending commissioners of bankrupt had not such an interest in the proceedings as privileged him from arrest *eundo et redeundo*; secondly, that the application should have been made to the Court of Chancery; for which he relied on *Ex parte List*,† and *Kinder v. Williams*,‡ where it was said, that the Court of King's Bench would not discharge a person in custody by process of the Sheriff's *Court in a cause afterwards removed into that Court, because he was arrested while attending commissioners of bankrupt to prove a debt. Thirdly, he contended, that at all events the defendant could only be privileged in his direct course to and from the Court, and not in unnecessary deviations.

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Goulburn, in support of his rule, was requested to confine himself to the question of deviation, when he contended that the privilege from arrest having always been supported to a liberal

† 2 Rose, 24.

‡ 4 T. R. 377.

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extent, it was for the plaintiff to shew distinctly that the defendant had deviated from his course, and not to leave the Court to collect it by inferences from ambiguous premises. In *Lightfoot v. Cameron*† the defendant was allowed to dine unmolested; and in *Willingham v. Matthews*‡ GIBBS, Ch. J., said, “With respect to the Insolvent Debtors’ Court being such a tribunal as to privilege a party from arrest, considering that it is a judicature created by the Legislature, I think that parties attending the Court must be considered as privileged from arrest.” The same principle was acted on with reference to arbitrators in *Spence v. Stuart*.§

TINDAL, Ch. J. :

This rule must be made absolute. As to the first point, that the petitioning creditor on a commission of bankruptcy does not, when attending the commissioners, fall within the principle which exempts suitors from arrest while resorting to and returning from courts of justice, I think the objection is untenable, and that the defendant, as petitioning creditor, had as much interest in attending before the commissioners as a creditor attending the Insolvent Debtors’ Court to *oppose the discharge of a debtor. Then, as to the second point, I think this was the Court to which the defendant ought to apply, because the process was issued out of this Court, and we have a right to see that it is not improperly enforced. *Willingham v. Matthews* is a case in point.

The third is the only question which requires discussion, namely, whether in this case the privilege has been claimed *bona fide*, or only set up as a pretence to defeat a creditor. Now all the cases say that this privilege is not to be strictly scanned, and I think the affidavit of the plaintiff does not sufficiently establish that the defendant was abusing the privilege he claims. It appears that the defendant was in a line leading to his home, and that throws upon the plaintiff the labouring oar to shew that the defendant was there improperly. Although two hours had elapsed after he quitted the Court they might have been devoted to refreshment, and the calls, at which the plaintiff does not

† 2 W. Bl. 1113.

§ 6 R. R. 549 (3 East, 89).

‡ 6 Taunt. 356; 2 Marsh. 57.

depose he was present, might, compatibly with what is sworn, have taken place before the defendant attended the commissioners.

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PARK, J. :

I have no doubt that the defendant, when attending the Commissioners' Court, going thither, and returning thence, was entitled to the privilege of exemption from arrest. He had an interest in being present, and the bond he entered into as petitioning creditor requires that he shall cause the commission to be duly prosecuted. And it is equally clear that this is the Court he ought to apply to to enforce the privilege. As to the alleged deviation from his direct route homewards, the privilege ought to be dealt out with a liberal hand. *Lightfoot v. Cameron* and *Willingham v. Matthews* are strong cases to that effect. In answer to an application of this kind the Court must be fully satisfied, *and not left merely to draw an inference that the party was out of his direct course. [*169]

BOSANQUET, J. :

I am of the same opinion. I think that the defendant had a sufficient interest in attending the commissioners to protect him *eundo, morando, et redeundo*, and that this is the proper Court to enforce his privilege. The only question is, whether or not he has abused that privilege. He is arrested two hours after he has left the commissioners, on the Surrey side of London Bridge in a direct line towards his home. That circumstance calls on the plaintiff, if he would vindicate the arrest, to shew clearly, and not by mere inference, how the two hours were disposed of by the defendant.

ALDERSON, J. :

It is clear that the defendant, in attending the commissioners, must be considered as a party concerned in his own cause. And *Willingham v. Matthews* is decisive to shew that the application for discharge is properly made to this Court. Upon the last point I have not been without doubt. But I think the circumstance, that the defendant was in a direct line towards his home, throws it upon the plaintiff to account for the time which had elapsed before the arrest.

Rule absolute.

1832.
Jan. 25.

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ANTHONY *v.* HANEYS AND HARDING.

(8 Bing. 186—194; S. C. 1 Moore & Scott, 300; 1 L. J. (N. S.) C. P. 81; Bigelow L. C. 374.)

Trespass for entering plaintiff's close. Plea, that certain goods of defendants' were there, and that they entered to take them, doing no unnecessary damage:

Held, ill.

TRESPASS. The declaration stated, that defendants, on the 8th of November, 1880, and on divers other days &c. between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon in the county of Hertford; and with feet in walking trod down, trampled upon, and consumed and spoiled plaintiff's grass, and with cattle and wheels of divers carts, &c. crushed, damaged, and spoiled other grass; and with the feet of the cattle and the wheels of the carts subverted, &c. the earth and soil of the close, and then and there put, placed, and laid down divers quantities, to wit, 5,000 bricks, &c. in and upon the said close, and kept and continued the same without the leave or licence and against the will of the plaintiff, and thereby greatly encumbered the close, and pulled down, prostrated, and destroyed one barn, three outhouses, and three leantos of plaintiff, and in so doing dug up and subverted the earth, and made divers holes therein, and seized, took, and carried away the materials of the said barn, outhouses, and leantos.

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There was a second count for seizing, taking, and carrying away a cart, and divers goods and chattels of plaintiff; and a third count, for breaking and entering a certain other barn, outhouses, and leantos of plaintiff, &c.

Plea, first, the general issue, on which issue was joined; second, that before and at the said times when, &c. in the said first count mentioned, the defendant John Haney was the owner of and entitled unto a certain barn, three outhouses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of 200*l.* then respectively standing and being in and upon the said close of the said plaintiff in which, &c.; wherefore the said defendant, John

Haney, in his own right, and James Haney and Joseph Harding, as the servants of the said John Haney, by his command, at the said several times when, &c. in the said first count mentioned, entered into and upon the said close in which, &c. in order to pull down, remove, take, and carry away the said barn, outhouses, and leantos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, outhouses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, waggons, and other carriages drawn by the said cattle, from and out of the said close in which, &c. and in so doing, they, the said defendants, at the said several times when, &c. in the said first count mentioned, did necessarily and unavoidably with their feet in walking, a little tread down, trample upon, consume, and spoil a little of the grass there then growing and being, and did, with the wheels of the said carts, waggons, and other carriages, a little crush, damage, and spoil other the said grass there also growing, and with the feet of the said cattle, and with the wheels of the said carts, waggons, and other carriages did a little subvert, damage, and spoil the earth and soil of the said close, and did necessarily and unavoidably put, place, and lay in and upon the said close in which, &c. the said bricks, tiles, wood, and rubbish in the said first count mentioned, being part of the materials of the said barn, outhouses, and leantos, and there keep and continue the same for a short time, to wit, until the same could be put in the said carts, waggons, and other carriages to be removed from the said close, doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, which are the said several supposed trespasses in the introductory part of this plea mentioned. Demurrer and joinder.

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Stephen, Serjt. was to have argued in support of the demurrer, but the COURT called on

Bompas, Serjt. to support the plea :

Although, without licence or lawful warrant, a man cannot enter the house of another, because every man's house is his castle, yet he may enter the close of another to recover his own

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goods, provided he be guilty of no breach of the peace ; and the authorities, if any, which militate against this position are founded on a misconception or misapplication of the case of *Taylor v. Friskin*,† where a plea that the defendant entered the plaintiff's house by leave of his wife, to take goods sold to him by the wife, was held ill. But with regard to a *close, supposing goods to be lawfully on it,—and it is not to be assumed that they are there unlawfully,—the owner of the close is bound to permit the owner of the goods to enter and take them : he enters, therefore, under an implied licence. In the present case the demurrer admits that the barns and outhouses belonged to the defendant, and the plaintiff not having averred that they were affixed to the freehold or unlawfully on the close, it must be taken that they were chattels, and lawfully there. Now, if trees be blown down, it is no trespass for the owner to enter the land into which they fall, to take them : *Millen v. Hawery*,; Vin. Abr. Tresp. H. a. 2. So, if a fruit tree grow in a hedge, and the fruit fall into another's land, the owner may go upon the land and fetch it : Vin. Abr. Tresp. L. a. So, if a man is to lop his tree, and he cannot do it unless it fall upon the land of another, he may justify the felling of it upon the other's land : *Dyke v. Dunstan*.§ In like manner he may justify chasing sheep upon another's ground if he cannot otherwise drive them off his own : *Millen v. Fandry*.|| There, “the point singly was but this ; I chase the sheep of another out of my ground, and the dog pursues them into another man's land next adjoining, and I chide my dog ; and the owner of the sheep brings trespass for chasing them : and it was argued by *Whistler*, of Gray's Inn, that the justification was not good, and he cited Co. lib. 4, 88 b, that a man may hunt cattle out of his ground with a dog, but cannot exceed his authority ; and by him an authority in law which is abused is void in all ; and to hunt them into the next ground is not justifiable. But per CREW, Ch. J. : It seems to me that he might drive the sheep out with the dog, and he

† Cro. Eliz. 246. See also *Holdingshaw v. Rag*, Cro. Eliz. 876, as to license by a servant ; and *Higgins v. Andrews*, 2 Roll. Rep. 55.

‡ Latch. 13.

§ 6 Edw. IV. 18.

|| Poph. 161. See *Sutton v. Moody*, 1 Ld. Raym. 250 ; *Churchward v. Studdy*, 12 R. R. 513 (14 East, 249).

*could not withdraw his dog when he would in an instant, and therefore it is not like to the case of 38 Edw. III., where trespass was brought for entering into a warren, and there it was pleaded that there was a pheasant in his land, and his hawk flew and followed it into the plaintiff's ground, and there it seems that it is not a good justification, for he may pursue the hawk, but cannot take the pheasant: 6 Edw. IV. A man cuts thorns, and they fall into another man's land, and in trespass he justified for it; and the opinion was, that notwithstanding this justification trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard case. But this case is not like to these cases, for here it was lawful to chase them out of his own land, and he did his best endeavour to recall the dog, and, therefore, trespass does not lie." The same principles are laid down in Com. Dig. Pleader, 3 M. 42. In the Year Book, 17 Hen. VI., it is said to be a lawful cause to enter a man's park, to shew him evidence to avoid a suit. In all such cases the defendant may be said to have a sort of way of necessity: as where he pursues goods which have been stolen. So, where a common highway is out of repair by the overflowing of a river or other cause, passengers have a right to go upon the adjoining land: *Absor v. French*,† *Henn's case*.‡ Or, if A. makes a lease for years, excepting the trees which he would afterwards sell, the law gives the lessor and those who would buy power to enter and look at the trees, for without sight none would buy, and without entry none would see: *Lifford's case*.§ And a man may enter the land of another to abate a nuisance: Com. Dig. Pleader, 3 M. 38.

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If the defendant have no right to enter, he may be *without remedy, for peradventure upon his demanding the goods the plaintiff may decline to make answer, or in anywise to stir in the affair, and without refusal on the part of the plaintiff as well as demand on the part of the defendant, trover will not lie.

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TINDAL, Ch. J.:

The second plea in this case cannot be supported in law; and

† Show. 28.

§ 11 Co. Rep. 52 a.

‡ Sir W. Jones, 296.

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it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three outhouses, three leantos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, leantos, &c. were standing on the close in the ordinary acceptance of the term, that is, were affixed to the freehold; and the rather, because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shewn on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shewn the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to shew how. To allow such a statement to be a justification *for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another: that falls under the head of an accident, for which the defendant is not responsible, and which he shews by his plea before he can make out a right to enter. So in the case of a tree which is blown down, or through decay falls into the ground of a neighbour, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken and the owner pursues to obtain possession,

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the principle is laid down by Blackstone,[†] who says, "As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted where such exertion must occasion strife and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the *occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.

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PARK, J. :

I am of the same opinion. The distinction is clearly laid down by Blackstone in the case of goods feloniously taken, who says, "If my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." Upon these pleas it rather appears that the property claimed by the defendant was attached to the freehold, than that it was a chattel in the nature of a Dutch barn, for it is admitted that he dug holes in order to remove it. The defendant is not, as it has been contended, without remedy, for he might sue in trover after a proper demand, and if his application were met with continued silence, the jury might from that presume a conversion.

[†] 3 Comm. 4. [This passage is explained in *Patrick v. Colerick* (1838) 3 M. & W. 483, 485.]

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I am of opinion that this plea is no answer to the trespass with which the defendant is charged. It is put broadly and nakedly that the defendant has a right to enter the soil of another to take his own property without shewing the circumstances under which it came there. The case has been argued on the ground of necessity; but on that ground, at least the necessity should be shewn. There are, no doubt, various cases in which it has been held that the party is entitled to enter, but in all of them the peculiar circumstances have been stated on which the party has rested *his claim to enter. It would be too much to infer that the party may enter in all cases where his goods are on the soil of another, because he may enter in some where he shews sufficient grounds for so doing.

ALDERSON, J. :

I am of the same opinion. The difficulty suggested as to an action of trover, would apply to all cases of trover where a demand is necessary.

Judgment for plaintiff.

1832.
Jan. 31.
[198]

ELTON v. LARKINS.†

(8 Bing. 198—201; S. C. 1 Moore & Scott, 323; S. C., at Nisi Prius, 5 Car. & P. 86, 385.)

The announcement in the foreign lists filed at Lloyd's of the sailing of a ship out of the port from which she is insured, does not, where the communication is material, dispense with the assured's disclosing a letter received from his captain before the policy is effected, announcing the day of his intended departure.

ON the 29th of December, 1828, the plaintiff's broker effected a policy of insurance on the brigantine *Fanny* from Cadiz to London, with leave to touch at Exmouth, at 30s. per cent. premium.

On the 17th of December the plaintiff had received a letter from the captain of the *Fanny*, dated Cadiz, November 21st, stating that the *Fanny* was nearly loaded; would probably sail for London the next day, and that the schooner *Traveller* had sailed for London on that day.

† Cp. *Mackintosh v. Marshall* (1843) 11 M. & W. 116, where *Elton v. Larkins* was not cited.—F. P.

This letter was not communicated to the underwriter.

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But in Lloyd's List of December 20th it was announced that the *Traveller* had been towed into Kinsale in distress, and that the ship *William* which had left Cadiz on the 30th of November, had arrived at Gravesend.

On the 22nd of December a printed list from Cadiz was received and filed in the inner room at Lloyd's, containing the words following: "25 Nov., bergantin *Fanny*, John Taylor, para Londres."

The voyage from Cadiz to London varies from sixteen to sixty days, but the average length is twenty-one.

The *Fanny* never having been heard of, the plaintiff sued on his policy, and at the trial before Bosanquet, J., London sittings after Trinity Term, the defence set up was, that the letter received by the plaintiff on the 17th of December from his captain at Cadiz, was a material communication, and ought to have been disclosed to the underwriter. Evidence was given that though underwriters are in the habit of referring to the announcements in Lloyd's books, and the English lists printed *from them, they do not, except under peculiar circumstances, resort to the foreign lists which are filed in that establishment; that if the time of sailing of the *Fanny* had been known, in conjunction with the fact that the *Traveller* had arrived at Kinsale, and the *William* at Gravesend, by the 20th of December, after leaving Cadiz on the 21st of November, or later, the *Fanny* would have been deemed a missing ship, and not insurable at 30l. per cent.

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The learned Judge left it to the jury to say whether the letter in question was material, and if so, whether the disclosure of it was rendered unnecessary by information *aliunde* within the reach of the underwriter.

A verdict having been found for the plaintiff,

Spankie, Serjt. obtained a rule *nisi* for a new trial, on the grounds above stated :

He cited *Kirby v. Smith*,† where a ship had sailed from Elsineur on her voyage home six hours before the owner, who followed in another vessel on the same day, and, having met with

† 19 R. R. 412 (1 B. & Ald. 672).

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rough weather on his passage, arrived first, and then caused an insurance to be effected on his own ship: it was held that those circumstances were material to be communicated to the underwriter, and that it was not sufficient to state merely that the ship insured was "all well at Elsineur on the 26th of July," the day of her sailing.

Wilde, Serjt. shewed cause:

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The assured is no doubt bound to communicate every fact within his knowledge, material towards estimating the risk, unless it be actually or impliedly within the knowledge of the underwriter. The time of a ship's sailing is not, in general, of itself a material fact; it may, however, become material in conjunction with other facts. The only fact which could *make the time of the *Fanny's* sailing material, is the arrival of the *Traveller* at Kinsale, and the *William* at Gravesend. Now, the assured could not be called on to communicate those arrivals, because it does not appear that he knew of them; if he did, he knew of them only through a channel which was equally open to the underwriter, Lloyd's books, the contents of which, it has been decided, an assured is not bound to communicate: *Friere v. Woodhouse*.† It may be contended, however, that even combining it with the arrival of the *Traveller* and *William*, the sailing of the *Fanny* was not a material fact, for the voyage from Cadiz to London varying from sixteen to sixty days, the *Fanny* could not be deemed a missing ship on the 29th of December.

The jury, by their decision, have shewn that they considered the disclosure of the letter in question immaterial.

Spankie:

In *Friere v. Woodhouse* it was the English list at Lloyd's which the assured was excused from communicating; but he ought to communicate the contents of the foreign lists, for an underwriter is not bound to know the meaning of *para Londres*, or to be versant in all modern languages. And the assured must at his peril disclose every material fact, whether he deems it to be material or not, and whether it is material at the time or only

† 17 R. R. 679 (Holt, N. P. 572).

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becomes so eventually. Thus, in *Bridges v. Hunter*,† the plaintiffs effected a policy of insurance on wines from Oporto to London on the 12th of November, at which time they were in possession of two letters from their correspondents at Oporto, the first of which, dated the 11th of October, stated, "We are loading the wines on board the *Stag*, Captain Wheatley, who intends to sail to-morrow;" the other, dated the 13th *of October, enclosed the bills of lading, which were filled up "with convoy;" the plaintiffs did not communicate these letters to the underwriters; and it was held a material concealment. To the same effect are *M'Andrew v. Bell*,‡ *Ratcliffe v. Shoolbred*,§ *Willes v. Glover*.||

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Cur. adv. vult.

TINDAL, Ch. J. :

Upon consideration of this case, we feel great doubt as to the ground upon which the jury have given their verdict for the plaintiff. They may have grounded their verdict upon the opinion which they formed, that the communication which the defendant contends ought to have been made to him by the plaintiff, was not a material communication. And if we could ascertain that this point had been distinctly found by the jury, we should not have disturbed the present verdict. But the jury may have come to their conclusion upon a different ground; namely that, admitting the communication was material in itself, yet that the knowledge of the facts which the defendant had in his power from the inspection of the book in the inner room at Lloyd's, dispensed with such communication being made, and that the want of such communication could not now be set up as an answer to the action. Being, therefore, uncertain as to the real ground on which the verdict proceeded, and as the evidence now stands, being dissatisfied with the verdict, if grounded on the second point, we think the cause should go before another jury; the defendant paying the costs of the former trial.

Rule absolute.

† 14 R. R. 380 (1 M. & S. 15).

‡ 1 Esp. 373.

§ Park Ins. 290.

|| 8 R. R. 739 (1 Bos. & P., N. R. 14).

1892.

Jan. 30.

*Exchequer
Chamber.*

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TRAFFORD AND OTHERS *v.* THE KING.†ERROR FROM R. *v.* TRAFFORD, 1 B. & Ad. 874.

(8 Bing. 204—214; S. C. 1 Moore & Scott, 401; 2 Cr. & J. 265; 1 L. J. (N. S.) Ex. 90.)

On indictment for nuisance to a public canal navigation established by Act of Parliament, it was found by a special verdict, among other things, that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts; that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried, by the natural level of the country, to the above mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed; that except for the fenders after mentioned, the arches in the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of water; that the defendants, occupiers of lands adjoining the river and brook, had, subsequently to the making of the canal, aqueduct, and embankment, heightened certain artificial banks, called fenders, constructed from time to time, as occasion required, on their respective properties, for the protection of their lands, so as to prevent the flood-water from escaping as above mentioned, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks, as to endanger them and obstruct the navigation; that the fenders were not unnecessarily high, and that if they were reduced, many hundred acres of land would again be exposed to inundation: Held, that to enable the Court to come to any decision between the parties, it ought also to have been found, 1. Whether the raising of the fenders was an ancient and rightful usage, or whether it had commenced since the construction of the canal; 2. Whether the course described by the special verdict to have been taken by the flood-water was, or was not, the ancient and rightful course; and, 3. Whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct.

INDICTMENT for a nuisance. The first count stated, that after the passing of a certain statute of the 2 Geo. III., viz. in 1763, a canal was made pursuant to the said statute, which from that time had been used by all the King's subjects with vessels not exceeding thirty tons burden, on payment of certain reasonable tolls; that the canal, by means of an aqueduct made pursuant to the Act, passed over the river Mersey, near the junction of a brook called Chorlton Brook; and that the defendants, on the 1st of January, 1770, and on other *days, raised divers mounds, &c., near the ancient banks of the said river and brook, viz. in

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† Followed in *Ridge v. Midland Ry. Co.* (1888) 53 J. P. 55.—R. C.

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parts thereof near the said aqueduct, and severally continued the same so raised, &c., whereby water was at divers times forced against the said aqueduct, and the sides and foundations thereof, and the sides and foundations of the said canal adjacent thereto, which water ought to have flowed, and, but for the said mounds, would have flowed and escaped by other ways, viz. over parts of the banks of the river and brook: by which means the said aqueduct, and the sides and foundations thereof, and of the canal adjoining thereto, had been injured, and were placed in danger of being broken down and destroyed, to the damage and common nuisance of the subjects using the said canal, and of the inhabitants and occupiers of the lands adjacent, &c. There were other counts, charging the defendants with severally raising and erecting the mounds, &c., and wrongfully continuing mounds, &c. theretofore injuriously erected. One count stated the injury to be done by confining the water, and causing it to break down the banks of the river and damage the adjacent lands, as well as the aqueduct and canal. Plea, not guilty. At the trial before Bayley, J., at the Summer Assizes for the county of Lancaster, 1829, the jury acquitted some of the defendants, and, as to others, found a special verdict, stating the following facts: In 1763 the navigable canal mentioned in the indictment was made from Longford Bridge in the township of Stretford, to the river Mersey, at a place called the Hemp Stones in the township of Halton, in pursuance of an Act of the 2 Geo. III., c. 11, enabling the then Duke of Bridgwater to make the same; and the King's subjects, ever since the making of the canal, have navigated it with boats not exceeding thirty tons burden, at their free will and pleasure, paying the duty by law established. The canal extends for half a mile north and south across a vale through which the river Mersey runs in a westerly *direction; it is upon the same level throughout, and is raised by artificial embankments on each side through the whole half mile, and is carried across the river by an aqueduct of one arch (mentioned in the indictment), which was built at the time of making the canal. At the distance of 430 yards from the river, towards the north, the canal is supported upon three arches, also built at the last-mentioned time; on the south side it has two culverts at 160 and 460 yards' distance from

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the river, one made at the same time with the canal, the other built by the trustees of the late Duke of Bridgewater (the proprietors of the canal) in 1806. About 800 yards above the aqueduct the river is joined from the east by Chorlton Brook, the capacity of which, at the junction, is equal to one tenth of the capacity of the river at the same point; and after this junction, the river, which had before flowed northward, turns immediately to the west.

On each side of the river, and also of the brook, there are now artificial banks called fenders, made to prevent the water, in times of flood, from overflowing the adjacent lands. These fenders have from time to time been raised, as occasion required, by proprietors and occupiers of adjoining lands; and the fenders on the banks of the river on the north side are now three feet higher than they were twenty years ago; the fenders on the northern banks of the brook two feet three inches higher than they were at the same period. Before the banks of the river and of the brook were so raised, the water of the river, in times of flood, was frequently penned back up the brook, and, together with the water of the brook, ran over the north bank of the brook, and inundating certain lands (the situation of which was particularly described in the verdict), made its way to the three arches above mentioned, on the north side of the river. After passing through these, it flowed along a low tract of land, until it fell into the river again at a place called Ermston, two miles from the said three arches, inundating in its course, both above and below the arches, many hundred acres of land, throwing down hedges, and otherwise doing much mischief. No regular watercourse was ever kept open for the flood water. Since the banks of the river and of the brook have been raised as above mentioned, the flood water, whenever it has overflowed or broken down the banks of the brook, has taken the same course to the three arches. The whole three arches are not necessary for any other purpose than for the passage of such flood water; one arch, of small dimensions, would be sufficient for the passage of all other water collected at that place. At times, since the making of the canal, the water of the river has overflowed the banks above its junction with the brook, and has inundated a tract of land on the south and west of the river; and by reason of the embankment on which

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the canal is raised, and of the want of sufficient outlets underneath, this flood water has (particularly in the year 1806) broken down the south bank of the river between the aqueduct and the brook, passed across the river, and broken down the north bank; and then, after inundating the adjoining lands, flowed down to the three arches before mentioned. In 1806 the trustees of the Duke of Bridgewater (the then proprietors of the canal), on complaint from the landowners on the north bank of the river, made them compensation for the damage so sustained; and they have, since that time, paid an annual rent or compensation for a piece of land on the south side, which was on that occasion washed away. They have, also, from time to time repaired the south bank of the time of the river and the fender thereon, to the extent of fifty yards eastward from the canal.

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The verdict then described the particular fields and fenders belonging to the several defendants, and it appeared that every fender was much higher than the land *to the north of it, and that the fenders on the banks of the river and brook had been raised from time to time within the last six years, and kept and continued so raised by the defendants severally in their respective occupations, but not jointly. It also described the level of the lands through which the flood water was accustomed to escape in the direction of the three arches as first above mentioned, and also the level of the bed of the river for some miles above its junction with the brook. A statement was then given of injuries sustained in July, 1828, when the flood-water broke the banks of the river and canal, (the navigation of which was stopped,) and ultimately flowed down to the three arches before mentioned.

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The improved drainage of the country higher up the river for many miles has occasioned a greater quantity of water to flow down the river to the aqueduct than used to flow to it for several years after it was built, but the aqueduct is still wide enough for the river water to pass at all times except in high floods. The raising of the fenders on the banks of the river and of the brook, has occasioned a much greater quantity of water to flow to the aqueduct in high floods than did or could flow to it for several years immediately after it was built, and has rendered it insufficient for the passage of the water in high floods, and thereby greatly

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endangered the canal. If the fenders on the banks of the river and of the brook were reduced to the height at which they were twenty years ago, a great part of the waters of the river and brook in high floods would overflow the banks of the brook, and inundate the neighbouring lands, and would take the direction in which the flood-water used formerly to flow to the said three arches, and thence to Ermston ; but many hundred acres of land would thereby be inundated, and great injury done to the owners and occupiers of that land. The fenders on the banks of *the river and of the brook have not been raised more than was necessary to prevent the lands being so inundated.

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The case having been removed into this Court, on error, after judgment had been given for the Crown by the Court of King's Bench,

F. Pollock, for the defendants below, contended that, as the bed of rivers is continually rising from the gradual deposit of matters washed down from the source to the mouth, the owners of adjoining lands must have a right of raising the banks from time to time to prevent the effects of inundation. That if the defendants below had in this case raised their embankments higher than usual, it was owing to the prosecutors' causeway, which, obstructing the passage of the waters in ordinary floods, and thereby occasioning damage to the land, it became necessary to prevent the overflow by a higher bank. By the statute which regulated the affairs of the canal, the prosecutors were bound to allow sufficient waterway.

Wightman, *contra*, admitting that to a certain extent the owners of adjoining lands might have, without occasioning injury to others, the right of raising fenders to obviate the effects of ordinary floods, denied the right, if the exercise of it occasioned injury to others, as it must do supposing the banks raised to such a height as to contain all floods whatever. As upon such a supposition the banks must continually rise, no bridge could be erected high enough to carry off the water for many years.

(As the judgment of the Court turned upon the form of the special verdict, it would be superfluous to state the argument at greater length.†)

† See 1 B. & Ad. 874.

TINDAL, Ch. J. :

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Upon this special verdict, in which judgment has been given for the Crown by the Court of King's Bench, such judgment appears to have proceeded expressly on the principle, that the ancient course and outlet of the flood water had been obstructed by the wrongful raising from time to time of the fenders therein described, by the defendants below.

Whilst, however, we agree in the principle so laid down by the Court, we are unable to discover, upon this special verdict, a finding of sufficient facts to warrant its application to the present case. In order to shew the defendants to have been guilty of the offence charged in this indictment, we think, in the first place, it ought to appear distinctly upon the special verdict that the raising and heightening of the fenders on the lands of the respective defendants, was not an accustomed and rightful usage which has obtained from time to time; that it was an enjoyment commencing since the construction of the canal in 1763; not sanctioned by ancient usage, or by the ordinary right which every man possesses, *prima facie*, to protect his own property, provided he can do it without injury to others: and that it ought also to appear distinctly that the course which the flood-water is stated in the special verdict to have taken, and by which it was carried again into the river at a lower point, was the ancient and rightful course which it ought to take.

And we think, in the second place, it ought not to be left in doubt, upon the facts found in the verdict, whether the raising the fenders to their present height has or has not become necessary in consequence of the construction of the aqueduct and embankment. On the contrary, that it ought to appear distinctly upon the finding by the jury, either that the embankment and the aqueduct have not wrongfully penned back more water upon the low lands of the defendants than was formerly collected in times of flood; or, that the banks of *the river and brook have been raised without any necessity, and not in self-defence against the consequences of the construction of the embankment and aqueduct; or, at all events, that the banks have been raised by defendants to an unreasonable and unnecessary height. And if these facts are left in doubt upon the

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TRAFFORD v. THE KING. special verdict, we think no judgment can be given against the defendants.

Upon the point firstly above suggested, there appears no doubt but that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands; with this single restriction, that they did not thereby occasion any injury to the lands or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the Act, then the construction of the aqueduct and embankment may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the Act, unless so far as the Act of Parliament may have restrained the exercise of such rights.

It appears, therefore, to us to be indispensable, in order to determine whether the acts of the defendants stated in the indictment are wrongful or not, that the jury should find such facts as will enable us to say with certainty, whether, before the making of the canal and embankment, there was any exercise by the landowners of the right of raising and heightening the banks from time to time, as occasion required, so as to confine the water at all times to the ordinary channel, and prevent it in times of flood from overflowing the banks; or, whether the passage over the banks in times of flood was the usual and ordinary course.

[212] But the present special verdict leaves the commencement of the enjoyment of this right in complete uncertainty. It states only that there "now are" on each side of the river and brook, artificial banks called "fenders," which have from time to time been raised, as occasion has required. It finds, indeed, in one part, that these banks are not raised higher than is necessary, a fact very strongly in favour of the defendants. But it gives no date whatever to the origin of these acts of enjoyment on the part of the owners of land adjacent to the river. Upon such a finding we do not feel ourselves competent to say whether the acts complained of in the indictment amount to a nuisance or not.

Again, the jury find, that before the banks of the river and brook were raised, the water of the river and brook were frequently

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penned back, and flowed over the north bank, by a track or course which is described in the verdict, and which is stated to fall into the river again at a place called Ermston, about two miles below the three arches. But it nowhere appears whether the flood-water was carried in that course before the aqueduct was made; nor whether it had been so carried for such a period of years over the lands of different persons, as to constitute a right of watercourse in time of flood in the direction described by the special verdict. But in order to establish the charge against the defendants, it was essential to shew that by their raising and heightening the banks of the river and brook, they prevented the water in time of flood from flowing in this particular course. We ought, therefore, to see upon the face of the verdict, that there was an existing right of this course for the flood water over the lands described in the special verdict, before we hold the defendants guilty of the offence charged.

Again, upon the second ground above suggested, we think this special verdict deficient. The special verdict *leaves it questionable whether the nuisance complained of, *i.e.* the danger to the aqueduct and the canal, is not attributable in some degree at least, if not entirely to the act of the owners of the canal. The special verdict states in terms, that since the making of the canal, the water of the river has at different times flowed over the banks much higher up the within mentioned river than the point of its junction with the brook: and then proceeds to state an instance of damage done in 1806, for which the commissioners named in the Act of Parliament awarded compensation on account of the insufficiency of the outlets under the canal embankments. Again, in the statement made of the levels of the river above the aqueduct, and of the fall immediately below, an inference at least is afforded that the embankment and the canal have contributed to the penning back the water, thus creating a necessity and justifiable ground for raising and heightening the banks. Without, however, in any manner asserting that such has been the case, or that such is the necessary inference from the facts stated, we only observe that this special verdict does not state with sufficient certainty what is the real cause of the penning back of the water in time of flood, nor whether the raising and heightening of the

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banks by the defendants had a legal and justifiable commencement, nor what is the rightful course of the flood water, nor generally does it lay before us such facts, as will enable us to say whether the acts done by the defendants are lawful or not, or to give any judgment, satisfactory to ourselves, that should bind the rights of the contending parties.

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Under these circumstances, the only course we can pursue is, to reverse the judgment which has been given for the Crown, and to award a *venire de novo*; and if another special verdict should be found, we think it would be desirable that it should contain an express *finding of the jury upon the several points to which we have above adverted, rather than the statement of facts from which the finding of the jury is only to be inferred.

Venire de novo awarded.

1832.
Jan. 30.
Exchequer
Chamber.
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GIBB v. MATHER AND OTHERS.

(8 Bing. 214—223; S. C. 1 Moore & Scott, 387; 2 Cr. & J. 254; 2 Tyr. 189; 1 L. J. (N. S.) Ex. 87.)

Where a bill is drawn payable at a particular place, and the drawee accepts it payable at that place, in an action against the drawer, presentment to the acceptor at that place must be proved.

The rule as to the liability of the drawer is not altered by the enactment of 1 & 2 Geo. IV. c. 78, s. 1 (reproduced in effect by s. 19 (2) (c) of the Bills of Exchange Act, 1882).

THE declaration stated that the defendant below, on the 27th of September, 1828, at Liverpool, that is to say, at Preston, in the county of Lancaster, according to the usage and custom of merchants, made and drew a certain bill of exchange in writing, and then and there directed the said bill of exchange to Messrs. Chapman and Fairclough, and then and there required the said Messrs. Chapman and Fairclough four months after the date thereof to pay to the order of the defendant below, in London, 175*l.* 10*s.* value received in timber; which bill the said Messrs. Chapman and Fairclough afterwards, to wit, on, &c. at, &c. accepted according to the said custom and usage of merchants, payable at Messrs. Jones, Lloyd, & Co., bankers, London. And the defendant below, to whose order the said sum of money in the bill of exchange specified was to be paid, afterwards, to wit, on,

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&c. at, &c. by one John Kempster, then and there being the agent of the defendant below in that behalf, indorsed the said bill of exchange according to the said custom and usage of merchants, and then and there delivered the said bill of exchange, so indorsed, to one John M'Killop; *and the said J. M'Killop afterwards, to wit, on, &c. at, &c. duly indorsed the said bill of exchange, and then and there delivered the same, so indorsed as aforesaid, to the plaintiffs below. And the plaintiffs below averred that afterwards, to wit, on, &c. at Liverpool, &c. the said bill was shewn and presented to the said Messrs. Chapman and Fairclough, upon whom the said bill was drawn, for payment thereof; and the said Messrs. Chapman and Fairclough were then and there required to pay the same; but that the said Messrs. Chapman and Fairclough did not, when the said bill was so shewn and presented to them for payment as aforesaid, or at any other time, pay the same, or any part thereof, but on the contrary thereof, then and there wholly refused so to do, and therein wholly failed and made default; of which said several premises the defendant below afterwards, to wit, on, &c. at, &c. had notice; by reason whereof, and by force of the said custom and usage of merchants, the defendant below then and there became liable to pay to the plaintiffs below the said sum of money in the said bill mentioned, when he, the defendant below, should be thereunto afterwards requested; and being so liable, the defendant below, in consideration thereof, afterwards, to wit, on, &c. at, &c. undertook, and then and there faithfully promised the plaintiffs below, to pay them the said sum of money in the said bill mentioned, when he, the defendant below, should be thereunto afterwards requested.

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In a second count it was alleged that the acceptors were, at Liverpool, required to pay the bill according to the tenor and effect of the bill and of the indorsements thereon; and

In a third, that the bill was, at Liverpool, in due manner shewn and presented to the acceptors.

At the trial before J. Parke, J., last Lancaster Assizes, *the plaintiffs below proved, that they were partners together in trade, and holders of this bill of exchange, which was as follows: "Liverpool, 27th of September, 1828, four months after date, pay

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to the order of myself in London 175*l*. 10*s*. value received in timber. DUNCAN GIBB. To Messrs. Chapman and Fairclough, Liverpool. Payable in London." The bill was accepted as follows: "Accepted at Messrs. Jones, Lloyd, & Co., bankers, London. CHAPMAN and FAIRCLOUGH." And indorsed as follows: "P. pro. Duncan Gibb JOHN KEMPSTER." The signature Duncan Gibb to the bill was proved to be the handwriting of the defendant below; and the acceptance of the bill by Messrs. Chapman and Fairclough, the handwriting of Thomas Fairclough, one of the partners in the firm of Messrs. Chapman and Fairclough. The defendant below himself presented the bill for acceptance to the said Thomas Fairclough, and himself received back the bill from the said Thomas Fairclough so accepted as above stated. The indorsement "P. pro Duncan Gibb. JOHN KEMPSTER," was the handwriting of the said John Kempster, who, when he so indorsed the bill, was duly authorized by the defendant below to indorse it on behalf of the defendant below. The bill was presented at Liverpool to the said acceptors Messrs. Chapman and Fairclough for payment, on the 30th day of January, 1829, on which day the bill had accrued due, and the said acceptors then and there refused to pay the same; and notice was given on the same 30th of January, 1829, by the plaintiffs below to the defendant below of the presentment of the bill to the said acceptors, and of their refusal to pay the same. These facts were also admitted by the counsel for the defendant below. PARKE, J., then delivered his opinion to the jury, that the said several matters so produced and given in evidence and admitted to be true, *were sufficient to entitle the plaintiffs below to a verdict, and with that direction left the case to the jury, who found for the plaintiffs below.

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A bill of exceptions having been tendered to the above direction of the learned Judge, it was now argued by

F. Kelly for the defendant below:

The plaintiffs below have no claim on the defendant below, unless they conform to the contract into which he has entered. That contract is expressly to pay in London. Formerly, when the acceptor of a bill of exchange accepted it payable at a particular place, the Court of King's Bench held that such an

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acceptance was an expansion, not a qualification of his liability to pay every where ; that a demand might be made on him in the particular place in question in addition to all other places in which he might be found ; but that, as he was liable in all places, it was not necessary to aver or prove a demand at the particular place in question. The Court of Common Pleas, on the other hand, held that the designation of a particular place of payment was a qualification of the contract, and that, therefore, a demand at such a place must be averred and proved. The House of Lords in *Rowe v. Young*† decided that the Court of Common Pleas had put the true construction on such a contract, but immediately passed an Act of Parliament, rendering the liability of an acceptor such as it had been expounded by the Court of King's Bench, unless to the designation of a particular place of payment in his acceptance he added the words, "and not elsewhere ;" which words not being found in the acceptance of this bill, the acceptance is a general acceptance : that Act, however, 1 & 2 Geo. IV. c. 78, is, by its title, preamble, *and enactments, confined to the case of acceptor. Now, in the case of a drawer of a bill of exchange, or maker of a promissory note, the Court of King's Bench and the Court of Common Pleas always concurred in holding, that the mention of a particular place of payment in the body of such instrument was an essential part of the contract imperative on the holder, who must therefore aver and prove a demand at that place in order to charge the drawer or maker : *Sanderson v. Bowes*,‡ *Roche v. Campbell*.§ It may be said that the bill in this case having been accepted generally before it was issued by the drawer, the latter has given currency to such general acceptance, and therefore is estopped to object that demand has not been made at the particular place specified. But though an acceptor may by apt words limit his own responsibility, or make it differ from the contract of the drawer, as by accepting at a longer date, or for a part only of the sum mentioned in the bill, no case can be found in which he has been allowed, under any circumstances, to enlarge the responsibility of the drawer. The fact, therefore, of the drawer's having issued the bill with

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† 21 R. R. 91 (2 Bligh, 391, 2 Brod. & B. 165).

‡ 13 R. R. 299 (14 East, 500).
§ 3 Camp. 247.

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this acceptance on it, may shew that he did not object to the expansion of the acceptor's liability, but is no proof that he consented to the expansion of his own.

Roscoe, contra :

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The statute 1 & 2 Geo. IV. c. 78, enacts, that an acceptance such as the present shall be deemed a general acceptance to all intents and purposes. Now those words would be superfluous, and a main object of the statute would be defeated, if a demand which would be sufficient as against the acceptor, should be held insufficient as against the drawer. In *Selby v. Eden*† a bill of exchange was, by the drawer, made *payable in London and there accepted; and yet it was held that averment or proof of presentment in London was unnecessary; and in *Fayle v. Bird*; that decision was confirmed.

F. Kelly :

The cases referred to are both actions against the acceptor; and in *Fayle v. Bird* Lord TENTERDEN nonsuited the plaintiff for want of a due presentment, though he afterwards acceded to the authority of *Selby v. Eden* for the sake of uniformity.

Cur. adv. vult.

TINDAL, Ch. J. :

This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptor. Upon the trial of the cause it appeared, upon production of the bill, that the drawer, in the body of the bill, required the drawees to pay to the order of himself "in London," the sum mentioned therein: that the bill was addressed to Messrs. Chapman and Fairclough, Liverpool, with the additional words "payable in London," and that it was by them accepted at "Messrs. Jones, Lloyd & Co. bankers, London." It appeared further, that on the day the bill became due, it was presented for payment to the acceptors at Liverpool, who refused payment, and that due notice of such refusal was given to the defendant below. The learned Judge, who tried the cause, directed the jury that the

† 3 Bing. 611.

† 6 B. & C. 531.

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evidence above stated was sufficient to entitle the plaintiffs below to recover, and the jury found their verdict accordingly for the plaintiffs below. The propriety of this direction now comes before us upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this, whether in an action against the drawer of the bill above set *forth, on the ground of non-payment by the acceptor, it is, or is not, necessary to prove a presentment for payment at the banking house in London where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

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Before the passing of the statute 1 & 2 Geo. IV. c. 78, it was a subject of considerable doubt in the courts of law whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration, and proving at the trial a presentment for payment at the place where the drawee had by his acceptance made the bill payable. Upon that point the Court of Common Pleas had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only; the Court of King's Bench, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there.

The conflicting opinions of the two Courts upon that point were set at rest before the passing of the statute, by the judgment of the House of Lords in the case of *Rowe v. Young*,† by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land.

But the doubt which had been formed, was confined to the case where the question arose between the holder and the acceptor; in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no *doubt appears to have existed, but that a presentment at the place specially designated in the

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† 21 R. R. 91 (2 Bligh, 391, 2 Brod. & B. 165).

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acceptance was necessary, in order to make the drawer liable upon the dishonour of the bill by the acceptor.

Still less did the doubt ever extend to cases where the drawer directed by the body of the bill that the money should be payable at a particular place. In such a case all the Courts at Westminster agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of King's Bench in the case of a banker's promissory note, which was made payable at a place named in the body of the note: *Sanderson v. Bowes*.† The same doctrine was also laid down in the case of *Roche v. Campbell*,‡ where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the drawer of a bill of exchange and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder: and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill.

[*222] Such then being the state of the drawer's liability, at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter nor has it in any manner altered the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone. The title *of the Act is to regulate acceptances of bills of exchange; and after reciting that it had been adjudged, that where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants, that such acceptance was a general acceptance, it proceeds to enact, that, after the passing of that Act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the

† 13 R. R. 299 (14 East, 500).

‡ 3 Camp. 247.

particular place by the words and in the manner directed in the Act.

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The very reference in the statute to the adjudication by law, imports that the Legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the Act. Again, the enactment comprehends in terms the case of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast upon acceptors by the enactment that an acceptance of a bill payable at a particular house shall thenceforth be considered as a general acceptance; and it gives the acceptor the power of protecting himself against such inconvenience by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and after an acceptance made payable at that place the bill should be returned to him dishonoured without a presentment to the house where it is made payable, it is as great a hardship upon him, as the Act had contemplated and provided for in the case of the acceptor. If then the statute had intended the enactment to apply to the case of the drawer, *we cannot but think the same protection would have been given to the drawer which has been given in terms to the acceptor of the bill.

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One argument advanced on the part of the plaintiff below is, that the acceptor has varied in his acceptance from the original terms in which the bill was drawn; and as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance under the operation of the late statute. But the answer to this argument seems to be that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance, any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in London,—the drawee accepts, specifying the particular house in London at which he intends to pay the bill. Without such specification the acceptance might be useless from its

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generality; and the form of the bill implies that the drawer expected and intended the drawee to make it.

We, therefore, think that as no presentment was made at the house of the bankers in London, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and, consequently, that the judgment which has been given for the plaintiff below must be

Reversed.

1832.
Jan. 27.
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MEDEIROS v. HILL.

(8 Bing. 231—235; S. C. 1 Moore & Scott, 311; 1 L. J. (N. S.) C. P. 77; S. C., at Nisi Prius, 5 Car. & P. 182.)

It is no defence to an action on a charter-party for not sailing on the voyage towards a port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party.

ASSUMPSIT on a charter-party dated September 27th, 1830. The defendant undertook that his ship being then at Plymouth should return with all convenient speed to Liverpool; should there load a full and complete cargo of salt; proceed therewith to Terceira; deliver the same there, freight free; and there, or at St. Michael's, load a homeward cargo of fruit, restraint of princes, &c. excepted; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to Liverpool, and there take the cargo on board, and sail on the voyage described in the charter-party.

[*232] At the trial before Tindal, Ch. J., London sittings after *Michaelmas Term, it appeared that the defendant's ship on her passage from Plymouth to Liverpool had touched at Fowey; that she had arrived at Liverpool too late to ship the salt, and never proceeded to Terceira. At the time of the contract Terceira was publicly and officially known to be under blockade by the Government of Portugal. There was no evidence, however, of any understanding between the contracting parties that the defendant was to violate the blockade; on the contrary, it rather appeared that the blockade had never been thought of till after the charter-party had been executed by the defendant's son on the part of the defendant; and long before that time the

blockade had ceased to be real or effective. A verdict having been found for the plaintiff with 100*l.* damages,

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Taddy, Serjt. moved for a new trial :

The stipulation to proceed to Liverpool with all convenient speed did not preclude the defendant from touching at Fowey, which is not out of the course from Plymouth to Liverpool, and even if it were, the touching there would be no breach of the defendant's contract, supposing him to have touched in the ordinary course of his business, and the voyage in other respects to have been performed with all convenient speed. A carrier who engages to go with all convenient speed does not thereby engage to go in the most direct line from place to place; and it is a sufficient performance of his contract if he use due diligence in his ordinary line: *Max v. Roberts*.† But the voyage to Terceira was illegal, and the plaintiff cannot recover for the defendant's omission to proceed thither; Terceira having at the time of the contract been in a state of blockade, the defendant had no right to sail with an intention to violate the blockade. Case *of the *Neptunus*, ‡ *Adelaide*, § and *Shepherdess*, || *Naylor v. Taylor*, ¶ *Dalglish v. Hodson*. ††

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At all events the defendant was not bound to procure simulated papers, or to run the risk of capture. In *Touteng v. Hubbard*, ‡‡ a British merchant chartered a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contained the usual exception against the restraint of princes; the ship was prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British Government; and it was holden, that the Swedish owner could not by proceeding on the voyage after the embargo was taken off entitle himself to recover the freight against the British merchant.

Cur. adv. vult.

TINDAL, Ch. J. :

This was an action upon a charter-party, by which the defendant engaged that his ship should return with all convenient

† 12 East, 89.

‡ 2 Rob. Adm. Rep. 110.

§ *Ibid.* in notis.

|| 5 Rob. Adm. Rep. 263.

¶ 33 R. R. 305 (9 B. & C. 718).

†† 33 R. R. 546 (7 Bing. 495).

‡‡ 6 R. R. 791 (3 Bos. & P. 291).

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speed to Liverpool, and there load a full and complete cargo of salt, and proceed therewith to Terceira, and deliver the same there freight free, and there, or at St. Michael's, load a homeward cargo of fruit; and the breach alleged in the declaration was, that the ship did not return with all convenient speed to Liverpool, and there take the cargo on board, and sail on the voyage described in the charter-party.

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After verdict for the plaintiff, and 100*l.* damages, a motion has been made for setting the same aside, and for a new trial, on two grounds; first, that at the time the charter-party was entered into, Terceira was in a state of blockade by the Government of Portugal, which blockade had been notified to the English Government, and, consequently, that the voyage described in the *charter-party was an illegal voyage. Secondly, that although the voyage may not be, strictly speaking, illegal, the circumstance of the blockade operated as an excuse for the non-performance of the contract.

The case of the *Neptunus*,† which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port, in violation of the blockade, and that after notification of the blockade the act of sailing to a blockaded port with the intention of violating the blockade is in itself illegal. But neither that case, nor any other that can be cited, has laid it down, that the mere act of sailing to a port which is blockaded at the time the voyage is commenced is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives off the port. Any such determination would be destructive in many instances of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which had been blockaded, at the very earliest moment after such blockade had been relaxed. Such an object appears to be legal, both from the opinions of Sir W. Scott in the case of the *Shepherdess*,‡ and from the judgment of Lord TENTERDEN, Ch. J. in *Naylor v. Taylor*.§ In the present

† 2 Rob. Adm. Rep. 110.

§ 33 R. R. 303 (9 B. & C. 718).

‡ 5 Rob. Adm. Rep. 264.

case there was no evidence of any understanding between the contracting parties that the defendant was to break the blockade of Terceira in order to deliver his outward cargo. Indeed the fact of the blockade did not appear to enter into the contemplation of either party, until after the defendant's son, the captain of the vessel, had signed the charter-party for his father; and upon the evidence the blockade had *ceased to be a real and effective blockade long before the charter-party was entered into.

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We see, therefore, no reason for holding the contract to be void on the ground of illegality.

As to the second point, it is sufficient to say that as the blockade had been publicly notified to the Government of England, the contracting parties must be taken to have entered into the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case the rule of law laid down in *Paradine v. Janet*† applies, viz. "That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

We think, therefore, the rule for a new trial must be refused.

Rule refused.

DOE v. HARVEY.

(8 Bing. 239—243; S. C. 1 Moore & Scott, 374; 1 L. J. (N. S.) C. P. 9.)

1832.
Jan. 31.

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Where a party holds land under a written agreement, parol evidence cannot be received of the fact under whom he came into possession.

TRESPASS for mesne profits.

At the trial before Alderson, J., at the last Somerset Assizes, the plaintiff, after proving that the defendant had occupied the premises in question from May, 1829, to May, 1830, offered in evidence a judgment in an ejectment brought for the same premises by the plaintiff in this action against Simon Payne,

† Alleyn's Rep. 27.

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and called as a witness the son of Simon Payne, who stated that he, *the son, had put the defendant in possession. It appearing, however, that this had been done under a written agreement, which was not produced, it was objected, on behalf of the defendant, that the witness could not, while that instrument existed, by parol evidence, disclose under whom the defendant held, and that without evidence that the defendant held under Payne, the judgment against Payne could not be produced against the defendant. And the learned Judge being of this opinion nonsuited the plaintiff.

Wilde, Serjt. obtained a rule *nisi* to set aside this nonsuit, against which rule

Stephen, Serjt. argued last Term that the written agreement was the best evidence to shew under whom the defendant held, and that the agreement being in existence and not produced, parol evidence to that point was properly excluded. Then, with respect to the judgment against Payne, he contended, as in *Doe v. Whitcombe*,† and on the authorities there cited, that the defendant not having been shewn to be party or privy, the judgment was no evidence against him.

Wilde :

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Parol evidence of any of the stipulations in the written agreement could not be received; but it was competent to the Judge to admit evidence of facts independent of the agreement; as, who professed to be landlord and received the rent. Those were facts which could not alter or interfere with any stipulation in the agreement, and might, therefore, be proved by other evidence. In *R. v. Holy Trinity, Hull*,‡ it was held that parol evidence of the fact of tenancy was admissible, although the tenant held under a written *agreement, and BAYLEY, J. said, “The general rule is, that the contents of a written instrument cannot be proved without producing it. But, although there may be a written instrument between a landlord and tenant, defining the terms of the tenancy, the fact of tenancy may be proved by parol, without proving the terms of it. It was unnecessary in

† 8 Bing. 46.

‡ 31 R. R. 267 (7 B. & C. 611).

this case to prove by the written instrument, either the fact of tenancy or the value of the premises." And PARK and GASELEE, JJ. held the same opinion in *Strother v. Barr*.†

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Cur. adv. vult.

TINDAL, Ch. J.:

This was an action of trespass for the mesne profits, upon the trial of which it was proved, that Harvey, the defendant, had occupied the premises in question from May, 1829, to May, 1830. The plaintiff, in order to prove his right to the possession of the premises during that period, offered in evidence, a judgment in ejectment brought for the same premises by the present plaintiff, against one Payne. It was objected that this record was not admissible in evidence against the present defendant, he not being the defendant in the original cause, nor shewn to claim through or under him. The only evidence that was given as to the origin or nature of Harvey's occupation was, that one Henry Payne, the son of the defendant in the ejectment, had put him into possession. But as it appeared from the same witness that he had been put into possession under a written agreement, which agreement was not produced, the parol evidence of Henry Payne, as to the landlord under whom he held, or the terms under which he was let into possession, was deemed insufficient for that purpose. The learned Judge, who tried the cause, held, under these circumstances, the record of the judgment *in ejectment to be inadmissible in evidence in this cause, and the plaintiff was thereupon nonsuited, with liberty to move to set aside the nonsuit, and enter a verdict for the plaintiff.

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After hearing the arguments against and in support of this motion, we are of opinion that the direction of the Judge upon both the points so made at the trial was right. As to the first point, if nothing had been in issue but the single fact, whether Harvey held or occupied the land, such fact might undoubtedly be proved by the payment of rent, declarations of the tenant, or other parol evidence sufficient to establish it, notwithstanding it appeared that he held under an agreement in writing. Authorities to this effect were cited in argument at the Bar. But here the

† 30 R. R. 515 (5 Bing. 136).

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question was, not merely whether Harvey held the premises, but whether he held them as tenant to Payne; and of this fact there was no other evidence admissible than the written agreement, which was not produced.

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The second point is simply this, whether in an action of trespass for the mesne profits, a recovery in ejectment against a former tenant in possession, is producible in evidence against a person who is afterwards found in possession, without proving that he came in under the defendant in ejectment, so as to make him a privy to the judgment in ejectment. And we are all of opinion that it is not. A recovery in ejectment is conclusive evidence both of the plaintiff's right to the possession, and that the defendant is a trespasser in an action for the mesne profits brought against the person who was defendant in the original action of ejectment: *Aslin v. Parkin*.† According to the resolution of the Judges, "the tenant is concluded by the judgment, and cannot controvert the title." But no reason has *been urged, nor any authority cited at the Bar, to shew that this judgment is to be considered as differing from judgments in other personal actions; and the general rule of law is, that judgments bind only parties and privies; but as to strangers are considered as *res inter alios acta*, and are not producible in evidence against them. In the case of *Denn v. White and Wife*,‡ it was held by the Court that in an action of trespass for the mesne profits against husband and wife, a judgment in ejectment against the wife could not be given in evidence against the husband, because he was no party to that suit: and again, in *Hunter v. Britts*,§ it was held by Lord ELLENBOROUGH, in an action of trespass for the mesne profits brought against the landlord of the premises, who had been in the receipt of the rents and profits from the time of the demise till the writ of possession was executed, that a judgment in ejectment against the casual ejectors was not admissible in evidence against him, without proof that the tenant upon whom the ejectment was served, had given him notice of it. And this appears to have been on the ground, that he was not privy to the judgment.

† 2 Burr. 668.

§ 14 R. R. 807 (3 Camp. 455).

‡ 7 T. R. 112.

The only proof in this action, that the defendant is a trespasser, or that the plaintiff has a right to the possession, is by the production of the judgment against Payne. But as the defendant is a stranger to Payne upon the evidence before the Court, no admission made by him, and no judgment obtained against him, ought to affect Harvey until he is shewn to be privy in estate with Payne. We therefore think the rule should be discharged.

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Rule discharged.

MILLER v. TRAVERS AND OTHERS.†

(8 Bing. 244—256; S. C. 1 Moore & Scott, 343; 1 L. J. (N. S.) Ch. 157.)

1832.
Jan. 28.
[244]

Devise of all testator's freehold and real estates in the county of L. and city of L. Testator had no estates in the county of L.; a small estate in the city of L., inadequate to meet the charges in the will; and estates in the county of C. not mentioned in the will: Held, that the devisee could not be allowed to shew by parol evidence, that the estates in the county of C. were devised to him in the draft of the will; that the draft was sent to a conveyancer to make certain alterations not affecting the estates in county C.: that by mistake he erased the words county of C.; and that testator, after keeping the altered will by him for some time, executed it without adverting to the alteration as to the county of C.

TINDAL, Ch. J.: † In this case the plaintiff, John Riggs Miller, filed his bill against the defendants for the purpose of establishing the will of the late Sir John Edward Riggs Miller, Bart., and for carrying into execution the trusts thereof. One of the defendants, Elizabeth Wheatley, was the sister and heiress-at-law of the testator. And upon hearing of the cause before his Honour the Vice-Chancellor, after the answers of the several defendants, and amongst others, the answer of the defendant, Elizabeth

† The LORD CHIEF JUSTICE of the Court of Common Pleas, and the Chief Baron of the Court of Exchequer, Lord LYNTHURST, having been called on to assist the LORD CHANCELLOR in the case of *Miller v. Travers and Others*, their joint opinion was delivered as above in the Court of Chancery by the LORD CHIEF JUSTICE, on the 28th of January. As this opinion is on a subject strictly relating to proceedings at

common law, and the case, which is fully stated above by the LORD CHIEF JUSTICE, is of the highest importance, it has been thought advisable to give it a place in these Reports.

† “A decision entitled to great weight.” *Per* Lord ABINGER, in *Doe d. Hiscocks v. Hiscocks* (1839) 5 M. & W. 363, 371, 9 L. J. (N. S.) Ex. 27, 31: and see *Barber v. Wood* (1877) 4 Ch. D. 885.—R. C.

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Wheatley, had been put in, and witnesses examined, his Honour ordered, amongst other things, "That the parties should proceed to a trial at law on the following issue; viz. whether Sir John Edward Riggs Miller, Bart. did devise his estates in the county of Clare, and in the county of Limerick, and in the city and county of the city of Limerick, or either and which of them, to the trustees mentioned in his will, and their heirs;" in which issue the plaintiff in the cause was to be the plaintiff, and the heiress-at-law and her husband defendants.

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Against this part of the decree the defendant, Elizabeth Wheatley, has appealed, and prays a rehearing of the cause so far as respects that part.

Upon the hearing of this petition of appeal, the LORD CHANCELLOR has been pleased to request the assistance of the LORD CHIEF BARON and myself; probably foreseeing, as the case has appeared in the result, that the propriety of directing an issue, at least as to the devise of the estates in the county of Clare, which was the main point in contention between these parties, would depend upon the nature of the evidence to be brought forward by the plaintiff, upon whom the affirmative in such issue would rest.

For if the evidence, and the only evidence which can possibly be brought forward by the plaintiff in support of his proposition, is of such a nature and description as to be inadmissible at the trial of the cause, it would be the duty of this Court to refuse the issue; it being manifestly to the advantage of both parties that such question should be decided in the first instance by the Judge sitting in equity, rather than that the very same question should be decided upon the very same principles of evidence by the Judge at Nisi Prius, after an expense and delay that must be worse than useless to all concerned in the suit.

Now the main question between the parties, and which has formed the principal subject of argument before us, is this, whether parol evidence is admissible to shew the testator's intention that his real estates in the county of Clare should pass by his will? There is a subordinate question as to the due execution of one sheet of the will, to which we shall afterwards advert, and upon which question an issue of a different and more limited form than that which has been at present directed,

may perhaps properly be granted, if the plaintiff thinks fit to insist upon it; but the great contention *between the parties is upon the question above proposed, as to the admissibility of parol evidence with respect to the estates in Clare.

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This question arises upon facts, either admitted or proved in the cause, which are few and simple.

The testator by his will, duly executed, devised "all his freehold and real estates whatsoever, situate in the county of Limerick, and in the city of Limerick," to certain trustees therein named and their heirs. At the time of making his will he had no real estate in the county of Limerick, but he had a small real estate in the city of Limerick, and considerable real estates situate in the county of Clare.

The real estate in the city of Limerick is admitted to have passed under the devise; but the plaintiff contends that he is at liberty to shew by parol evidence that the testator intended his estates in Clare also to pass under the same devise.

The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small, and so disproportioned to the nature of the charges laid upon it, and the trusts which are declared, as to make it manifest there must have been some mistake; and in order to shew what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus: "All my freehold and real estates whatsoever situate in the counties of Clare, Limerick, and in the city of Limerick;" that the testator directed some alterations to be made in other parts of his will, and that the same copy of the will, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such *alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did by mistake, and without any authority, strike out the words "counties of Clare," and substitute the words "county of" in lieu thereof, so as to leave the devise in question in the same precise form as it now stands

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in the executed will. The plaintiff further proposes to prove, that a fair copy of the will so altered was sent to the testator, who, after having kept it by him for some time, executed the same in the manner required by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken, for the purpose of the argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to the LORD CHIEF BARON and myself, that admitting it may be shewn from the description of the property in the city of Limerick, that some mistake may have arisen, yet, still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied by the evidence proposed to be given.

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It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject-matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain *what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim "*Ambiguitas verborum latens, verificatione suppletur.*"

But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in

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the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale : or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take. (Bac. Max. 23. Hob. Rep. 32. *Edward Altham's case*, 8 Co. Rep. 155.) The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation ; or where an estate is devised to a person whose surname or Christian name is mistaken ; or whose description is imperfect or inaccurate ; in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient *indication of intention appearing on the face of the will to justify the application of the evidence.

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But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or, indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but in order to make out such intention is compelled to introduce new words and a new description into the body of the will itself.

The testator devises all his estates in the county of Limerick and the city of Limerick. There is nothing ambiguous in this devise on the face of the will. It is found, upon enquiry, that he has property in the city of Limerick which answers to the description in the will, but no property in the county. This extrinsic evidence produces no ambiguity, no difficulty in the application of the words of his will to the state of the property as it really exists. The natural and necessary construction of the will is, that it passes the estate which he has in the city

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of Limerick, but passes no estate in the county of Limerick, where the testator had no estate to answer that description.

The plaintiff, however, contends, that he has a right to prove, that the testator intended to pass not only the estate in the city of Limerick, but an estate in a county not named in the will, namely, the county of Clare, and that the will is to be read and construed as if the word Clare stood in the place of or in addition to that of Limerick.

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But this, it is manifest, is not merely calling in the aid of extrinsic evidence to apply the intention of the testator, as it is to be collected from the will itself, to the existing state of his property; it is calling in extrinsic evidence to introduce into the will an intention not apparent *upon the face of the will. It is not simply removing a difficulty, arising from a defective or mistaken description; it is making the will speak upon a subject on which it is altogether silent, and is the same in effect, as the filling up a blank which the testator might have left in his will. It amounts, in short, by the admission of parol evidence, to the making of a new devise for the testator, which he is supposed to have omitted.

Now, the first objection to the introduction of such evidence is, that it is inconsistent with the rule, which reason and sense lay down, and which has been universally established for the construction of wills, namely, that the testator's intention is to be collected from the words used in the will, and that words which he has not used cannot be added : *Denn v. Page*.†

But it is an objection no less strong, that the only mode of proving the alleged intention of the testator is, by setting up the draft of the will against the executed will itself. As, however, the copy of the will which omitted the name of the county of Clare was for some time in the custody of the testator, and, therefore, open for his inspection, which copy was afterwards executed by him with all the formalities required by the Statute of Frauds, the presumption is, that he must have seen and approved of the alteration, rather than that he overlooked it by mistake. It is unnecessary to advert to the danger of allowing the draft of the will to be set up as of greater authority to evince the intention of

† 1 R. R. 655, n. (3 T. R. 87, n.).

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the testator than the will itself, after the will has been solemnly executed, and after the death of the testator. If such evidence is admissible to introduce a new subject-matter of devise, why not also to introduce the name of a devisee, altogether omitted in the will? If it is admissible to introduce new matter of devise, or a new devisee, why *not to strike out such as are contained in the executed will? The effect of such evidence in either case would be, that the will, though made in form by the testator in his lifetime, would really be made by the attorney after his death; that all the guards intended to be introduced by the Statute of Frauds would be entirely destroyed, and the statute itself virtually repealed.

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And upon examination of the decided cases on which the plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above adverted to, that an uncertainty, which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself.

Thus, in the case of *Lowe v. Lord Huntingtower*,† in which it was held that evidence of collateral circumstances was admissible, as of the ages of the several devisees named in the will, of the fact of their being married or unmarried, and the like, for the purpose of ascertaining the true construction of the will; such evidence, it is to be observed, is not admitted to introduce new words into the will itself, but merely to give a construction to the words used in the will consistent with the real state of his property and family; the evidence is produced to prove facts, which, according to the language of Lord Coke in 8 Co. Rep. 155, “stand well with the words of the will.”

The case of *Standen v. Standen*‡ decides no more, than that a devise of all the residue of the testator's real *estate, where he has no real estate at all, but has a power of appointment over real estate, shall pass such estate over which he has the power,

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† 4 Russ. 581, n.

‡ 2 Ves. J. 589.

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though the power is not referred to. But, this proceeds upon the principle that the will would be altogether inoperative, unless it is taken that, by the words used in the will, the testator meant to refer to the power of appointment.

The case of *Moseley v. Massey* and others† does not appear to bear upon the question now under consideration. After the parol evidence had established that the local description of the two estates mentioned in the will had been transposed by mistake, the county of Radnor having been applied to the estate in Monmouth, and *vice versa*; the Court held that it was sufficiently to be collected, from the words of the will itself, which estate the testator meant to give to the one devisee, and which to the other, independent of their local description: all, therefore, that was done, was to reject the local description, as unnecessary, and not to import any new description into the will.

In the case of *Selwood v. Mildmay*‡ the testator devised to his wife part of his stock in the 4 per cent. Annuities of the Bank of England; and it was shewn by parol evidence, that at the time he made his will, he had no stock in the 4 per cent. Annuities, but that he had had some, which he had sold out, and had invested the produce in Long Annuities. And in this case it was held, that the bequest was in substance a bequest of stock, using the words as a denomination, not as the identical *corpus* of the stock; and as none could be found to answer the description but the Long Annuities, it was held that such stock should pass rather than the will be altogether inoperative.

[*253] This case is certainly a very strong one; but the decision *appears to us to range itself under the head, that "*falsa demonstratio non nocet*," where enough appears upon the will itself to shew the intention after the false description is rejected.

The case of *Goodtitle v. Southern*§ falls more closely within the principle last referred to. A devise "of all that my farm called Trogues Farm, now in the occupation of A. C." Upon looking out for the farm devised, it is found that part of the lands which constituted Trogues Farm are in the occupation of another person. It was held, that the thing devised was sufficiently ascertained by

† 8 East, 149.

‡ 4 R. R. 1 (3 Ves. 306).

§ 14 R. R. 435 (1 M. & S. 299).

the devise of "Trogues Farm," and that the inaccurate part of the devise might be rejected as surplusage.

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The case of *Day v. Trigg*[†] ranges itself precisely in the same class. A devise of all "the testator's freehold houses in Aldersgate Street," when in fact he had no freehold, but had leasehold houses there. The devise was held in substance and effect to be a devise of his houses there; and that as there were no freehold houses there to satisfy the description, the word "freehold" should rather be rejected than the will be totally void.

But neither of these cases afford any authority in favour of the plaintiff; they decide only that where there is a sufficient description in the will to ascertain the thing devised, a part of the description which is inaccurate may be rejected, not that any thing may be added to the will; thus following the rule laid down by ANDERSON, Ch. J. in *Godb. Rep.* 131: "An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator."

On the contrary, the cases against the plaintiff's construction appear to bear more closely on the point. In the first place, it is well established, that where a *complete blank is left for the name of a legatee or devisee, no parol evidence, however strong, will be allowed to fill it up as intended by the testator: *Hunt v. Hort*,[‡] and in many other cases.

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Now the principle must be precisely the same, whether it is the person of the devisee, or the estate or thing devised which is left altogether in blank. And it requires a very nice discrimination to distinguish between the case of a will, where the description of the estate is left altogether in blank, and the present case, where there is a total omission of the estates in Clare.

In the case of *Doe d. Oxenden v. Chichester*[§] it was held by the House of Lords, in affirmance of the judgment below, that in the case of a devise of "my estate of Ashton," no parol evidence was admissible to shew that the testator intended to pass not only his lands in Ashton, but in the adjoining parishes, which he had been accustomed to call by the general name of his Ashton estate.

[†] 1 P. Wms. 286.

[§] 16 R. R. 32 (4 Dow, 65).

[‡] 3 Br. C. C. 311.

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The CHIEF JUSTICE of the Common Pleas, in giving the judgment of all the Judges, says, "If a testator should devise his lands, of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of those counties." Lord ELDON, then Lord Chancellor, in page 90 of the report, had stated in substance the same opinion. The case so put by Lord ELDON and the CHIEF JUSTICE is the very case now under discussion.

But the case of *Newburgh v. Newburgh*, decided in the House of Lords on the 16th of June, 1825,[†] appears to be in point with the present. In that case the appellant contended, that the omission of the word "Gloucester" in the will of the late Lord Newburgh proceeded upon a mere mistake, and was contrary to the intention *of the testator, at the time of making his will, and insisted that she sought to be allowed to prove, as well from the context of the will itself as from other extrinsic evidence, that the testator intended to devise to her an estate for life as well in the estates in Gloucester, which was not inserted in the will, as in the county of Sussex, which was mentioned therein.

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The question, "whether parol evidence was admissible to prove such mistake, for the purpose of correcting the will and entitling the appellant to the Gloucester estate, as if the word 'Gloucester' had been inserted in the will," was submitted to the Judges, and Lord Chief Justice ABBOTT declared it to be the unanimous opinion of those who had heard the argument, that it could not.

As well, therefore, upon the authority of the cases, and more particularly of that which is last referred to, as upon reason and principle, we think the evidence offered by the plaintiff would be inadmissible upon the trial of the issue, and that it would therefore be useless to grant the issue in the terms directed by the VICE-CHANCELLOR.

Upon the second point that has been made, namely, whether the sheet of the will numbered 20 forms any part of the will, although we cannot but form a strong opinion from the evidence in the cause as to the result of such an issue, still as it is a question merely of fact, and one upon which by possibility

[†] See 21 R. R. 310, 312 (5 Madd. 364).

further evidence might be produced, we think an issue might properly be allowed, directed, and limited to the precise investigation of that single fact.

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Some arguments were offered by the plaintiff's counsel upon the construction of the will from the context of the whole instrument; and it was contended, that without the introduction of any extrinsic evidence, the estates in Clare would pass under the will; but as the state of *the cause at the time of the hearing did not admit of such discussion, and as the counsel for the defendants disclaimed entering upon it at present, we have, in fact, not heard the parties on that point, and we therefore think it right to forbear offering any opinion thereon.

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The LORD CHANCELLOR expressed his concurrence in the opinion delivered as above, and after adverting to some of the cases cited, said, The result will be, that the issue cannot be granted as ordered by his Honour the VICE-CHANCELLOR; but upon the other point, whether the sheet marked No. 20 formed a part of the will at the time of the execution, the parties, if they think it worth their while, may have an issue.

Whether the whole instrument taken altogether, and without going out of it, was sufficient to pass the estates in Clare, is a point which has not been argued here, and on which we give no opinion.

Order of the Vice-Chancellor reversed.

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1892.
Jan. 23.

SAME v. BASTIAN.

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(8 Bing. 275—287; S. C. 1 Moore & Scott, 272; 1 L. J. (N. S.) C. P. 62.)

The corporation of T. having proved a prescriptive right to tolls: Held, that it was not destroyed by a charter of Elizabeth, granting and confirming, among other things, all the ancient rights of the corporation, but exempting the inhabitants from toll in all places except London:

Held, that this exemption applied to the tolls of all other places (except London), but not to the tolls of T.

DEBT for tolls due, and of right payable to plaintiffs for and in respect of goods landed by defendant from ships upon plaintiffs'

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quay: in respect of goods landed by defendant from certain ships: and in respect of goods of defendant imported into and exported from and out of a certain port or harbour: for tolls generally; and for crannage and wharfage.

Plea, nil debet.

At the trial before Alderson, J., last Bodmin Assizes, the plaintiffs produced the following charter of the date of Stephen or Henry II.:

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“Reginald Fitzroy, Earl of Cornwall: To all the barons of Cornwall, and all knights and all free tenants, and all men, as well English as Cornish, greeting. Know ye, that I have granted to my free burgesses of Triverieu all free *and municipal customs, and the same in all things which they had in the time of Richard de Lacy, to wit, sac and soc and thol and theam and infangenethef. And I have granted to them that they do not plead in hundred courts nor county courts, nor for any summons go to plead elsewhere without the town of Triverieu; and that they be quit of giving toll throughout all Cornwall in fairs and markets, and where-soever they buy and sell. And that of their money lent and not restored they take distress in their town of their debtors.”

Ancient books of the corporation were then produced, shewing various demises of the quay dues by the corporation from 1637 to 1692, (in 1672 they were described as ancient dues,) and from 1703 to 1713; lists of biddings for the same dues; surveys at various intervals from 1730 to 1800; payment of poor-rate in respect of the dues in 1702 and 1703; and receipts given by various collectors for dues at various times anterior to living memory.

Numerous witnesses proved the actual receipt of the dues by the plaintiffs or their lessees from various inhabitants of the borough of Truro as well as strangers, from the year 1790 to the present time, and various acts of ownership on the quay. About four fifths of the entire dues were received from inhabitants.

The sums sought to be recovered of the defendants were 1*d.* for every sack of flour landed at the quay.

The defendants, as inhabitants of the borough of Truro, claimed exemption from these dues under a charter of 31 Eliz., which, after reciting that the borough of Truro was an ancient

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borough ; that the port of Falmouth was in decay and wanted speedy repair, because from the constant employment of the tinner there a great quantity of rubbish had accumulated in the port, to the great injury of the port ; that the borough of Truro was so injured thereby, that whereas formerly *ships of 100 tons used to come laden into the port, now scarcely ships of thirty tons could enter ; that the inhabitants of Truro had endeavoured by all means to preserve the port, as well as by constant cleansing and repairs, in order that ships coming thither might pursue their ancient course (*ad Clavem, Anglicè*) to the keye ; and that the inhabitants of the said borough enjoyed many franchises, liberties, privileges, customs, usages, and immunities, as well by prescription as by divers charters, grants, and confirmations, as well of Reginald, formerly Earl of Cornwall, as of divers Kings of England ; granted to the inhabitants to be incorporated by the name of the “ Mayor and Burgesses of the Borough of Truro,” and that they by the name of the mayor and burgesses, &c. might and should be for ever capable by law to have, &c. lands, tenements, liberties, privileges, jurisdictions, franchises, &c. to them and their successors in fee ; and also goods, &c., and that they and their successors, by the mayor and council, &c. should make bye-laws, &c. It then granted and confirmed to the said mayor and burgesses, and their successors, all messuages, lands, tenements, customs, privileges, immunities, advantages, &c. within the said borough, which the said mayor and burgesses, or the inhabitants, by whatever names or name corporate or incorporate, by reason or colour of any prescription, &c. for fifty years past had held : and that the burgesses and inhabitants of the said borough, and their successors from thenceforth for ever, should and might be free of tollnet, passage, pontage, murage, pannage, penage, anchorage, coynage, wharfage, crantage, keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandizes throughout the whole kingdom of England, except the city of London, and the suburbs and limits thereof. And that they might have fairs and markets within the borough, to be held and kept in pontage, *keyage, portorage, weighage, lastage, anchorage, and culage, &c.

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There was evidence also by which it appeared that the

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inhabitants had been excused from paying anchorage for empty vessels, and exempted from serving on juries. But the tariff by which the inhabitants were excused from anchorage recited their liability to quayage, and it appeared that they paid anchorage for ships laden with coals.

In the second cause the defendants relied also on alleged variations in the amount of the tolls collected, particularly in the article of currants and molasses; but these variations consisted chiefly of clerical mistakes in the collector's accounts, and of an attempt made in 1815 by the collector and town steward, without the privity of the corporation, to assimilate the tariff of Truro to that of Falmouth and Penzance; which attempt was abandoned upon a remonstrance by the inhabitants of Truro. In a tariff fifty years old there were only four variations among 150 charges, and none of these variations affected the toll for flour.

It was objected also, on the part of the defendants, that the plaintiffs had not proved their title to sue as a corporate body by the style of the mayor and burgesses of Truro.

The learned Judge over-ruled this objection, and left it to the jury to find whether the plaintiffs had shewn a prescriptive right to the tolls in question, or whether the existence of the charter of Elizabeth, although the charter could not of itself abrogate any former grant or prescription, was incompatible with the presumption of such a prescription.

The jury having found for the plaintiffs,

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Merewether, Serjt., in Michaelmas Term, moved for a new trial, on the ground that the plaintiffs had given no evidence of their title to sue as the mayor and burgesses of Truro; that the defendants were exempted from toll by the charter of Elizabeth, the acceptance of which implied a surrender of all former charters and rights, prescriptive or otherwise; and that the variations in the amount of the toll were fatal to the claim by prescription.

The Court thought the plaintiffs had adduced sufficient *prima facie* evidence of their right to sue in a corporate capacity, and therefore refused a rule on the first ground, but granted it on the two others.

Wilde, Serjt. shewed cause :

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The variations in the amount of toll have been satisfactorily explained at the trial, and are too recent to affect the validity of this prescription. The clause relied on by the defendants in the charter of Elizabeth, exempts the inhabitants of Truro from dues in other towns except London, but does not exempt them from dues necessary for the support of Truro, and received by the corporation long before the charter. The construction contended for by the defendants would render the grants to the corporation nugatory,—for four fifths of the tolls are paid by inhabitants,—and leave the town without walls or bridges ; for the same clause which exempts the inhabitants from tolls exempts them also from murage and pontage. The meaning of the clause, therefore, is clear ; but if it were doubtful, the true exposition has been put upon it by contemporary and continued usage, which in cases of doubt has been holden to be the safest guide : *Attorney-General v. Parker*,† *Blankley v. Winstanley*,‡ *Withnell v. Gartham*,§ *Chad v. Tilsed*,|| *Lowden v. Hierons*,¶ *Rex v. West Looe*,†† *Rex v. Grout*,‡‡ **Norton v. Hammond*,§§ *Corporation of Stamford v. Pawlett*.||| Besides which, all claims of exemption are to be construed strictly : 2 Roll. Abr. 202, tit. Prerogative le Roy, Z.

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Merewether :

The construction contended for by the defendants will not render the grants to the corporation nugatory, for they may have other property wherewith to support the quay, walls, and bridges ; or they may be entitled to levy these tolls of the inhabitants on fair and market days, to which the grant in the charter is confined, without having a right to levy them at all times : *Warrington v. Mosely*.¶¶ But the charter of Elizabeth having specified London as the only place in which the inhabitants of Truro shall be liable to toll, has by that specification impliedly exempted them in all other places, including Truro itself. The

† 3 Atk. 577.

‡ 1 R. R. 704 (3 T. R. 279).

§ 3 R. R. 218 (6 T. R. 388).

|| 23 R. R. 477 (2 Brod. & B. 403).

¶ 19 R. R. 542 (2 Moore, 102).

†† 3 B. & C. 677.

‡‡ 35 R. R. 227 (1 B. & Ad. 103).

§§ 1 Younge & Jer. 94.

||| 1 Crompt. & Jer. 57.

¶¶ 4 Mod. 319.

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language of the charter is unambiguous; the acceptance of it by the corporation is an implied surrender of all former corporate rights; and the grantees under that charter are estopped to claim upon any previous right. The usage relied on is ambiguous, and altogether subsequent to the charter of Elizabeth.

TINDAL, Ch. J. :

There is no necessity, nor would there be any justice in submitting this case to a second jury.

The question is, whether the plaintiffs have established a prescriptive right to a toll of 1*d.* a sack for certain goods landed on the quay at Truro? The plaintiffs rest their claim on prescriptive usage. To see whether they have supported it, let us take, first, the evidence which is independent of the charter of Elizabeth. For the last forty or fifty years it appears that 1*d.* has been paid for every sack of flour landed on the quay by inhabitants of Truro as well as strangers.

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Then, we have evidence of receipts of various sums by collectors, for quayage, long antecedent to the time of living witnesses. Further back we find various biddings for the ancient quay duties of Truro: and then leases of these duties from 1637 to the early part of the last century. Now if this had been the whole evidence adduced, who could doubt that it would sufficiently establish a prescriptive usage?

If we were to hold otherwise, we should hold that the security of rights was impaired instead of being confirmed by long-continued usage.

Then comes the charter of Elizabeth. It may be admitted that if there were an express renunciation on the face of the charter of all antecedent privileges, the parties must take the benefit of the charter with the disadvantage so attached to it: but neither by express renunciation nor by necessary implication can we collect from this charter that there was to be any alteration in the duties of the quay. Even if there were a doubt, the receipt of rent for the dues up to 1637 would remove it, for contemporary usage is of great weight in the exposition of such instruments; and no one can suppose that the lessees of those times would burthen themselves with the payment of a rent for

tolls if the charter were adverse to the claim of the corporation. But looking to the charter itself, we see no reason for doubt. The charter begins by calling Truro an ancient borough: that, of itself, may imply a borough by prescription. It then goes on to confirm all advantages which the burgesses had had by reason of any prescription for fifty years last past; and then comes the clause relied on for the defendants, "The burgesses and inhabitants of the said borough, and their successors from henceforth for ever hereafter, shall and may be free of tollnet, passage, pontage, murage, pannage, penage, anchorage, coynage, wharfage, crantage, *keyage, stallage, lastage, feltage, and tollage, stonegeld, and scot of all their own proper things, goods, and merchandizes, throughout our whole kingdom of England, except the city of London." It has been contended that this constitutes an exemption of the inhabitants from all duties within the borough.

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The natural impression on first reading the passage is, that the sovereign who grants is about to grant the inhabitants an exemption from some duties to which they were liable antecedently to the charter. But upon looking at the words accurately, it is plain they cannot relate to duties within the borough of Truro. "Shall be free of tollnet, passage,"—that must mean passage over the lands of others, for it is not probable they should have paid toll for passing over their own lands.

Take "pontage;" that is a duty levied for repairing bridges. It would be reasonable to exempt them from repairs of bridges at Exeter or Bristol; but if they were not to repair at Truro, who should?

Take "murage;" that, it is well known, was a duty for the repairs of the town walls, and necessarily cast on the inhabitants; so that if they are exempted under this grant, it would follow that the Queen meant them to be without walls. If we find in the sentence, these words, which cannot apply to exemptions in the town of Truro, why are we to hold anchorage, wharfage, and quayage, to mean the anchorage, wharfage, and quayage of that town?

Then follows, "and shall have fairs and markets within the borough, to be held and kept in pontage, quayage, weighage, lastage, &c.;" and it is contended that this implies a negative of a larger prescriptive right for all periods of the year. But if the

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general right be once established, the introduction of words merely affirmative will not rescind it. I have never *heard that if an existing right be shewn, it can be taken away by mere words of addition. It is true one cannot always explain why such words have been added. It may be *pro majori cautelâ*; but they have no effect to cut down an antecedent right.

An argument has been raised on the word "anchorage," and it is urged that it appears from a tariff of duties that anchorage has not always been taken from the inhabitants. But it appears the inhabitants do pay on all ships laden with coals; and the amount of the exemption is, that in some instances they do not pay for empty vessels.

The utmost effect of this is, that as the grantees of duties may relinquish the demand where they find it burthensome, by common consent it seems to have been agreed, that duties for empty vessels shall not be demanded.

This disposes of the first case. It would be of no use to send the cause down again if the second trial would be attended with no different result, particularly when it has been left to the jury to find, and they have found a prescription antecedent to the charter.

The second case is the same, with the exception that a variance was alleged in the toll for a cask of currants and a cask of molasses. But the question on that variance was left to the jury, whether it arose from mistake or accident, or they were satisfied it was such as defeated the prescriptive right. And as it was so left to them, it would be of no use to try the question a second time.

PARK, J. :

I am of the same opinion, and never heard so clear a case. First, as to usage. We have it in a strong and uniform course from 1637 to 1829; and the earlier documents carry in themselves traces of usage long before. But if in modern times we find the usage *uniform for a considerable period, we are bound rather to support such usage than to defeat it upon any immaterial variance. And nothing can be more reasonable than this custom, that the corporation, which is at the expense of keeping up the

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quay and adjoining streets, should raise toll to defray the necessary expense.

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It is said, indeed, that the corporation may possess other funds ; but of that there is no evidence whatever. We are called upon, however, to suppose that the charter of Elizabeth is the beginning of this custom to levy toll, and it is true, that there is no evidence of any payment before 1697. But the evidence is uniform to 1674 ; a document of 1672 speaks of the dues as "ancient dues;" it can scarcely be believed that the word "ancient" would be applied to a custom of less than forty years' standing ; and the charter itself speaks of the ancient course to the quay.

The exemption proved in respect of certain dues for anchorage has been sufficiently accounted for by the CHIEF JUSTICE, and it may have originated in the circumstance, that the harbour at that place required no further repairs.

I agree in the correctness of the construction put by the CHIEF JUSTICE on the general clause of exemption in the charter. It would be absurd to suppose the inhabitants exempted from duties which must have been granted to the corporation to enable them to keep up the necessary repairs of the town. They are exempted from the murage and pontage of other places, but must be liable to their own. The special exception of London from the general clause of exemption, arose either from the pre-eminence of the capital, or for the sake of greater caution ; but it leads to no inference that the inhabitants were to be exempted from the necessary charges of their own town.

BOSANQUET, J. :

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The rule must be discharged. Two matters have been proposed for our consideration ; first, the existence of a prescriptive usage ; secondly, the effect of the charter of Elizabeth. The first, a matter of fact ; the second, a question of law for the Court. Now, upon the first it was left to the jury pointedly to say whether this usage existed before the date of the charter. And on that subject the evidence is exceedingly strong.

It appears that these dues have been received for near 200 years ; and in an early part of that period they are described as ancient dues. The only question on a new trial would be,

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whether the jury were clearly wrong in their finding on this point. It seems to me they were clearly right.

In the second case, indeed, there appears a trifling variation in some of the payments; but the nature and cause of that variation was left to the jury, and by them properly disposed of.

It appears that the dues in respect of anchorage were not levied on light vessels; but a consent that they should not be collected in such cases, rather confirms than impugns the general right to dues in the other cases.

Secondly, as to the construction of the charter of Elizabeth: If the exemption from quayage were unequivocal, and the corporation had accepted the charter subject to such exemption, they would, no doubt, be bound by it; but one question is, whether the language of the charter is so unequivocal as to countervail the prescriptive usage found by the jury; for if it be only equivocal, it must be explained by the usage. Now, the construction contended for is most unreasonable, namely, that the corporation of Truro is to levy a duty on all the rest of the kingdom for the support of their quay, and not on the inhabitants of the town of Truro. The exemption, it will be observed, is in the nature of a grant. *The reasonable construction, therefore, is, that it means an exemption from duties elsewhere, which the sovereign might, without inconsistency, remit. It would be most unreasonable to suppose an exemption from the duties granted by a clause in the same charter containing no exception. Stress has been laid on the clause respecting duties in fairs and markets. I shall not repeat the observations of the CHIEF JUSTICE; but if the right in question, as the jury have found, was vested in the corporation before the charter, the affirmative language of the charter will not deprive them of the antecedent right.

[*286]

ALDERSON, J. :

I concur in the decision which has been pronounced. I thought the case clear at the trial, and I have seen no reason to alter my opinion.

It was a question for the jury to say, whether the corporation had any prescriptive right to these dues. The evidence began

with modern usage, and in the first cause it was proved that there had been no variations as far as human memory went. Then followed much documentary evidence, to shew that the quayage had been let and taken from 1637 to the present time.

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I left it to the jury to consider whether it was not reasonable to infer that the duty had been taken as far back as 1637; and whether from that circumstance they would not infer a legal origin of the custom. If such evidence be not sufficient to warrant such an inference, I do not know what title would stand the test of legal enquiry.

And the charter of Elizabeth does not in any way break in upon this title.

I shall not add to what has fallen from the CHIEF JUSTICE on that subject. But as to the argument drawn from the grant of duties during fairs and markets, such a grant in its nature only enables the corporation to levy from the strangers who frequent the fairs and *markets during their temporary sojourn, whereas my brother *Merewether* who relied on the argument, contends that strangers are to be liable at all times. I think, therefore, the jury have found a right verdict.

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The second case turned on the question whether there had been any variation in the usage in modern times. The evidence of that was, an unsatisfactory witness whose credit was left to the jury; a tariff fifty years old, containing only four variations in 150 charges, (not one of which variations applied to the charge now in issue,) and papers which at various times had been given by the collectors to inhabitants of the town, in some of which the variation was a mere mistake on the face of the paper.

If no corporation could maintain its tolls without producing a series of bills exempt from mistake, it is probable that no tolls would long exist.

But in 1815 it appeared there had been an attempt to establish a new tariff, accompanied with some improper conduct by a collector, without the privity of the corporation. That new tariff was presented to the people of Truro; they had a meeting; refused to pay; and in a conference with the corporation, produced the old tariff, when they settled from that the rates which have been demanded ever since. That was of itself strong

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evidence in favour of the ancient toll, and put an end to the objection on the ground of variance. The whole, however, was left to the jury, and I told them if they were of opinion the corporation had established a right to the ancient amount of toll, a slight variation in modern times would not destroy it. I was satisfied with the verdict, and think this rule should be

Discharged.

1892.
April 17.
[309]

WYATT v. HODSON.†

(8 Bing. 309—314; S. C. 1 Moore & Scott, 442; 1 L. J. (N. S.) C. P. 93.)

Under 9 Geo. IV. c. 14, payment of interest within six years by one of several joint contractors takes a debt out of the Statute of Limitations as against all.

THIS was an action on a promissory note for 1,000*l.*, which the defendant, as a surety, had made jointly and severally with his brother in November, 1824.

The Statute of Limitations having been pleaded, the plaintiff proved payment of interest by the defendant's brother up to 1828; whereupon a verdict was found for the plaintiff, with leave for the defendant to move to set it aside, and enter a nonsuit, on the ground that payment of interest by a joint contractor would not, as against the co-contractor, revive a debt barred by the statute.

[310]

Jones, Serjt. having obtained a rule *nisi* accordingly,

Wilde, Serjt., who shewed cause, referred to 9 Geo. IV. c. 14, s. 1, which provides that nothing therein contained shall alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; and to *Whitcomb v. Whiting*,† *Jackson v. Fairbank*,§ *Perham v. Raynal*,|| *Burleigh v. Stott*,¶ *Pease v. Hirst*,†† and *Chippendall v. Martin*‡‡ to shew that payment of interest by one of several joint

† Cited by STIRLING, J. in judgment, *Re Wolmershausen* (1890) 62 L. T. 541, 544.—R. C.

‡ Dougl. 652.

§ 2 H. Bl. 340.

|| 27 R. R. 655 (2 Bing. 306).

¶ 32 R. R. 334 (8 B. & C. 36).

†† *Ante*, p. 343 (10 B. & C. 122).

‡‡ 4 Car. & P. 98.

contractors is an acknowledgment of debt binding on the others ; when the COURT called on

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Jones (Andrews, Serjt. was with him) :

The decision in *Whitcomb v. Whiting*, on which the subsequent cases are founded, was disapproved of in *Atkins v. Tredgold*,† and is incompatible with *Bland v. Haselrig*.‡ And the 9 Geo. IV. c. 14, which has enacted that even an actual promise to pay shall not 'revive a six years' debt, unless such promise be in writing, could never mean to give a greater effect to an implied promise. Now the payment of interest is only an acknowledgment from which a promise to pay may be implied ; and though by an exception in the statute it is enacted, that payment of interest by any person whatsoever shall prevent the time of limitation from taking effect, yet that must be confined to the individual paying, or an executor or administrator ; the word "whatsoever" being substituted for executor and administrator, which immediately before occur in the clause limiting the effect of a promise by one of many joint contractors. "No joint contractor, or executor or administrator of any contractor, shall lose the benefit of *the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." From the provision, also, respecting judgment, it may be collected that the conclusive effect of payment of interest was to be confined to the individual paying, and to executors or administrators : "Provided, also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act as to one or more of such joint contractors, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

[*311]

† 26 R. R. 254 (2 B. & C. 23).

‡ 2 Ventr. 151.

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The natural meaning to be put on the words "or otherwise," is the payment of interest described in the proviso immediately preceding.

TINDAL, Ch. J.:

It seems clear to us that the defendant is not protected by the statute. The question turns on the construction of 9 Geo. IV. c. 14; and in order to consider that rightly, we should see what the law was before that statute passed. Now, in *Burleigh v. Stott*, which was, like this, an action against the administrator of a surety on a joint and several promissory note, it was held that a payment on account of the note within six years by the other joint contractor operated as a promise to pay the residue by all who were jointly liable.

[*312] The statute then provided for the case of promises by one of many joint contractors. After enacting that *an oral promise shall not suffice to revive a demand barred by the Statute of Limitations, it proceeds: "And where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." That is a provision in favour of such as are not parties to the written promise. Then, with respect to payment of principal or interest, it provides, "that nothing herein contained shall alter, or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever." Not confining the effect of payment to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. The statute then proceeds to enact, "that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff, though barred

by either of the said recited Acts or this Act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

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It has been urged, that from the word "otherwise" we must imply "by payment of interest," and thence infer *that payment of interest, like the written acknowledgment or promise with which it is coupled, is to operate only against the party paying. But there are various acts to which the word "otherwise" might apply; as payment into Court, or indorsement by a party who had received interest. However, on the broad construction of the Act, we think payment of money by one of several joint contractors an acknowledgment not within the mischief or the remedy provided by the Legislature against the effect of an oral promise.

[*913]

PARK, J. :

I have always considered *Whitcomb v. Whiting* a governing case, notwithstanding some observations which have been thrown out against it. But the case has been recognised in *Burleigh v. Stott*, and confirmed in *Perham v. Raynal*, where an acknowledgment by one of several joint contractors on a promissory note was held to be binding on the others.

That was, like the present, the case of a surety, and, therefore, expressly in point. Then, the recent statute having distinguished between the effect of a promise by one of many joint contractors and the payment of interest by such a person, the law, in respect of such a payment, remains as it was under the previous decisions.

GASELEE, J. :

I am of the same opinion. The words "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever," coming after the enactment that a party should not be

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prejudiced by the promise of a joint contractor, is a convincing proof that a distinction was intended between the two cases.

ALDERSON, J. :

[*314] When the Act passed, the case of *Burleigh v. Stott* had decided that payment on account, *by one of many joint contractors should have the effect of fixing them all ; and the Act says, that the effect of such an acknowledgment shall not be lessened.

Rule discharged.

1832.
 April 19.

KEY, ASSIGNEE OF SHERWIN, A BANKRUPT, v. SHAW.

(8 Bing. 320—323 ; S. C. 1 Moore & Scott, 462.)

[320]

A trader, having been denied to a creditor who called for money, was after a little time, stated by a witness to have been seen peeping over his wife's shoulder. Upon another occasion, seeing a creditor coming, he retired behind a partition at the back of his shop, and his wife coming forward said he was not at home :

Held, that a jury were properly directed to consider whether the trader “ had kept his house ; had wilfully secluded himself ; that is, had withdrawn himself from a part of the house where he was likely to meet a creditor, to a more retired part.”

[*321] THE question on the trial of this cause was, whether Sherwin had committed an act of bankruptcy. As to which, Willis, a witness produced by the plaintiff, stated, that he called at Sherwin's house to demand *money due to him from Sherwin, when he was told Sherwin was not at home. Another creditor, who called about the same time for the same purpose, having received a like answer, became exceedingly boisterous, when Mrs. Sherwin appeared, and having endeavoured in vain to appease him, Sherwin was at length seen peeping over his wife's shoulder.

Hicks, another witness, stated, that he also called for money due to him, when Sherwin appeared from behind a partition at the back of the shop ; but seeing the witness, immediately retired, and Mrs. Sherwin, who came forward, said her husband was not at home.

Upon this part of the case, BOSANQUET, J., before whom the cause was tried, directed the jury to consider “ whether Sherwin had kept his house ; had wilfully secluded himself ; that is, had withdrawn himself from a part of the house where he was likely to meet with his creditors, to a more retired part.”

The credit, however, of other witnesses called by the plaintiff having been materially impaired, and his case being open to infirmatory observations in other respects, a verdict was found for the defendant; whereupon

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Taddy, Serjt. moved for a new trial, on the ground of a misdirection as to the evidence of Willis and Hicks, and of the verdict being against that evidence. The learned Judge, he contended, had laid down the law too narrowly. "Beginning to keep his house," in the language of the statute, was not confined to a trader's secluding himself in a retired part of his dwelling, or locking himself up; it was equally a beginning to keep house, if the trader shirked from a creditor, by eluding his approach, even if he only retreated behind his wife's back. In like manner, the breach of an appointment was holden to fall within the words, "departing from his dwelling-house, or otherwise absenting himself": **Gillingham v. Laing*.† The direction of the learned Judge would have been proper for a state of facts such as occurred in *Dudley v. Vaughan*;‡ but it was likely to mislead the jury, where the keeping house was not so much by retiring to a less frequented part of it as by eluding the eye of the creditor.

[*322]

TINDAL, Ch. J. :

I think the Court ought not to grant a rule in this case. It has been objected that the learned Judge did not point the attention of the jury to that class of acts of bankruptcy on which the plaintiff relied, and that he only put it to them to enquire whether the party had wilfully secluded himself from a creditor. Even if he had stopped there he could not easily have been misunderstood; for the jury might well apply the term "wilfully secluded" to a momentary concealment. But the learned Judge added words explanatory of what he meant by "wilfully secluded," namely, whether the party withdrew himself from a part of the house where he was likely to meet with creditors to a more retired part? That exactly meets the testimony of Hicks and Willis; and as evidence was adduced on the part of the defendant, on which the verdict of the jury might fairly proceed, the rule must be refused.

† 6 Taunt. 532.

‡ 1 Camp. 271.

KEY
F.
SHAW.

PARK, J. :

The summing up of the learned Judge was as favourable for the plaintiff as the case admitted ; and the question was correctly put to the jury.

A mere omission to keep an appointment is not, as it has been suggested by my brother *Taddy*, an act of bankruptcy. That was expressly determined in *Tucker v. Jones*.†

GASELEE, J. concurred.

[323] BOSANQUET, J. :

My attention had been called to the precise point, by a reference to the case of *Fisher v. Boucher* ; ‡ and I told the jury, that if the party had wilfully secluded himself from a creditor, he had committed an act of bankruptcy, explaining, at the same time, the sense in which I employed the term “ secluded.”

Rule refused.

1832.
April 27.

UMBRAGIO OBICINI v. BLIGH.

(8 Bing. 335—355 ; S. C. 1 Moore & Scott, 477 ; 1 L. J. (N. S.) C. P. 99.)

[335]

In order to sustain a suit in England for damages awarded by an Admiralty Court abroad, the transcript of the proceedings in the Admiralty Court should shew expressly, and not by mere inference, the sentence of the Admiralty Court, and that the defendant was within its jurisdiction.

THIS was an action of debt brought to recover a sum which the plaintiff claimed to be due to him on a judgment of the Vice-Admiralty Court of the island of Malta. At the trial of the cause before Tindal, Ch. J., London sittings after last Trinity Term, a verdict was found for the plaintiff for 299*l.*, subject to the opinion of the Court on the following case :

[336]

The plaintiff was the administrator, under limited letters of administration, of Gregory Mattei, formerly of the island of Malta. The defendant was a captain in his Majesty's navy, and at the time the cause of action arose, commanded a ship of war called the *Glatton*.

On the 5th of January, 1809, a Sicilian vessel called *La*

† 2 Bing. 2.

‡ *Ante*, p. 542 (10 B. & C. 703).

Madonna della Lettera e Gesu Maria Giuseppe was captured by the *Glatton* under Captain Bligh, and taken into Malta, when a claim was made for the said ship and cargo in the Vice-Admiralty Court at Malta; and it was upon the proceedings of that Court in that cause that the present action was brought.

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The plaintiff produced in proof of those proceedings, a document under the seal of the said Court, of which the following is a copy :

“George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland King, defender of the faith: To all and singular persons of whatsoever dignity, state, degree, or pre-eminence they be, to whom these present letters testimonial shall come, greeting. We do by these presents make known and signify unto you, that upon examining the records of our Vice-Admiralty Court of the island of Malta, and territories thereunto belonging, kept by John Locker, Esq., the principal registrar of the said Court, we find certain interlocutory decrees, instruments, and proceedings, had, made, and prosecuted in our said Vice-Admiralty Court in a certain cause or business, intituled *La Madonna della Lettera e Gesu Maria Giuseppe*, Francesco Micali, master, taken by his Majesty's ship of war *Glatton*, George Miller Bligh, Esq., commander, and brought to Malta, to the tenor and effect, and at the times hereinafter expressed; to wit,

“On Saturday the 25th day of February, 1809, before the Worshipful John Sewell, Doctor of Laws, Judge of the Vice-Admiralty Court of the island of Malta, and territories thereunto belonging, in the court room situate *in Strada Mercanti, in the city of Lavaletta, in the said island of Malta :

[*337]

“Present, W. Stevens, deputy registrar :

“ <i>La Madonna della Lettera e Gesu Maria Giuseppe</i> , Francisco Micali, master, taken by his Majesty's ship of war <i>Glatton</i> , George Miller Bligh, Esq., commander, and brought to Malta.	On admission of the territorial claim for the ship and cargo.”
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“*Rouverie*, for Fenton, prayed the claim of territory for ship and cargo to be admitted, and the ship and cargo to be restored with costs and damages.

“*Jackson* prayed the cause to stand over until Wednesday, in

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order that the captain might translate certain letters of advice and invoices, to shew that part of the cargo did not belong to the subjects of his Sicilian Majesty.

“*Rouverie* objected thereto, and prayed the cause to be heard immediately; whereupon the Judge directed the cause to be heard this day, both proctors agreeing to take the papers as translated. The Judge then gave leave to Mr. Mattei, the agent of his Sicilian Majesty, to amend his claim if he thought proper; whereupon the Court was informed Mr. Mattei wished to hear the claim as it then stood; whereupon the Judge having heard the evidences and proofs read, and advocates and proctors on both sides thereon, admitted the claim for the ship and cargo (save the goods mentioned in the bill of lading, No. 19); pronounced the ship and cargo (saving as before) to belong as claimed; and, by interlocutory, decreed the same to be restored to the claimant for the use of the owners and proprietors thereof, and reserved the adjudication of goods in bill of lading, No. 19, and the question of costs and damages, to whensoever; and by further interlocutory decree pronounced freight to be due on said goods: decree of unlivery of goods in bill of lading, No. 19. *Jackson* *prayed a decree of inspection of said goods, which the Judge was pleased to reject.

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“On Saturday, the 15th day of April, 1809, before the Worshipful John Sewell, &c., on admission of the territorial claim as amended, and on the question of costs and damages, Fenton prayed the territorial claim inasmuch as amended to be admitted, and the remainder of the cargo to be restored, with costs and damages.

“*Jackson* alleged that he did not object to the admission of said territorial claim as amended, but prayed the Judge to reject Fenton’s petition for costs and damages. The Judge having heard the aforesaid claim and evidence and proofs, read at the petition of Fenton, on motion of counsel, and with consent of *Jackson*, admitted the aforesaid claim; pronounced the goods to belong as claimed; and by interlocutory decree the same to be restored to claimant for the use of the owners and proprietors thereof; and having heard advocates and proctors on both sides, by further interlocutory decree pronounced the demurrage to be due from the day of the capture, viz., the 5th of January, to the

4th of March last, as also interest on the value of the cargo for such period, and special damage, if any could be shewn, but gave no costs; and further reserved the consideration of premium of insurance.

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“ On Wednesday, the 14th of March, 1810, before the Worshipful John Sewell, &c., the deputy registrar’s report, as to damages, is confirmed if not objected to by this day. The Judge was pleased to confirm the said report. Present, Allen and Jackson.

“ On Saturday, the 10th of October, 1810, before the Worshipful John Sewell, &c., Fenton and Allen alleged, that on the 14th of March last the registrar and merchants’ report as to special damages was confirmed, and that their clients had made repeated application to the captor’s agent for the payment of the amount of *said special damages as confirmed, but that he had not been able to obtain the same; and prayed the Judge to decree a monition to issue forth against the said captors and their agent for the payment of such special damages, and which the Judge decreed accordingly.

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“ Monition.

“ “ George the Third, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith. To John Chapman, Gent., Deputy Marshal of the Vice-Admiralty Court of the island of Malta and the territories thereunto belonging, greeting: Whereas, the Worshipful John Sewell, Doctor of Laws, Judge of the Vice-Admiralty Court of the island of Malta, and the territories thereunto belonging, and also to hear and determine all and all manner of causes and complaints as to ships and goods seized and taken as prize, specially constituted and appointed, rightly and duly proceeding in a certain cause or business of prize, moved and prosecuted before him in our said Court on behalf of George Miller Bligh, Esq., commander of our ship of war *Glatton*, the captor of a certain vessel called *La Madonna della Lettera e Gesu Maria Giuseppe*, whereof Francisco Micali was master, against the said ship or vessel, her tackle, apparel, and furniture, and all and singular the goods, wares, and merchandizes laden therein, and also against Gregory Mattei, the claimant of the said ship and cargo, on the 15th day of April, in the year of our Lord 1809, by his interlocutory decree, decreed

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certain goods to be restored to the said claimant for the use of the owners and proprietors thereof, and condemned the captors in certain demurrage, costs, and special damages sustained by the claimants: And whereas on the 10th day of October instant, the said Judge rightly and duly proceeding at the petition of the proctors of the said claimants, alleging, that on the 14th day of March last the registrars' *and merchants' report as to the special damages and demurrage was confirmed, and that their clients had made repeated applications to the captor's agent for the payment of the amount of said special damages and demurrage, but that they had not been able to obtain the same, hath decreed monition to issue forth against the said George Miller Bligh, the captor of the said ship and cargo, and William Robertson, the agent of the said captors, to pay to the said claimant the sum of 2,991 scudi, 11 taris, and 11 grains of Malta currency, being the amount of said special damages and demurrage as confirmed, besides the charges of this monition, and the execution thereof, within fifteen days after service (justice so requiring); we do therefore charge and strictly enjoin and command you, that you omit not by reason of any liberty or franchise, but that you monish or cause to be monished, peremptorily and personally, the said George Miller Bligh, commander of our said ship of war *Glatton*, the captor of the above vessel and her cargo, and Wm. Robertson, the agent of the said captor, to pay, or cause to be paid, to the said claimant, or his proctors, the sum of 2,991 scudi, 11 taris, and 11 grains, being the amount of such special damages and demurrage, as confirmed as aforesaid, besides the charges of this monition and the execution thereof, within fifteen days after service, under pain of the law, and the peril which will fall thereon; and that you duly certify to our aforesaid Judge or his surrogate, what you shall do in the premises, together with these presents. Given at La Valetta, in our aforesaid Vice-Admiralty Court, under the seal thereof for causes, this 27th day of October, in the year of our Lord 1810, and of our reign the fifty-first.

“ ‘ W. STEVENS, Dep. Reg.’

“ Monition against captors and agents to
pay special damages and demurrage.

“ Fenton and Allen, Proctors.”

*Endorsed, "I, John Chapman, deputy marshal of the Vice-Admiralty Court of the island of Malta, and the territories thereunto belonging, do hereby certify that the within original monition was personally served on the within-mentioned W. Robertson, by shewing to him the within monition under seal, and by leaving with him a true copy thereof. And I do also certify that the aforesaid monition was not served on the within-mentioned George Miller Bligh, by reason of his having left this island some time ago, and that he has not at present returned to Malta. Witness my hand this 8th day of November, 1810, &c.

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"*Madonna della Lettera*, &c. Francisco Michali, M^r. This 14th day of November, 1810, appeared personally John Chapman, of the city of Valetta, gent., deputy marshal of the Vice-Admiralty Court of the island of Malta and the territories thereunto belonging, and made oath that the contents of the certificate endorsed on the back of the annexed monition, and to which he hath subscribed his name, were and are true.

"Sworn before me,

"ROBERT FORRIST.

"On Monday the 28th November, 1810, before, &c., Fenton returned the monition duly executed, and prayed an attachment. *Jackson* appeared for Mr. W. Robertson, and alleged him not to be the agent of his Majesty's ship *Glatton*, and that he was not in possession of any effects belonging to the said ship, and prayed him to be dismissed from all observance of justice in that matter.

"All and singular which premises, as they have been drawn up and passed in our aforesaid Vice-Admiralty Court, so we have thought fit that the same should be exemplified unto you; and we do attest that the same do agree, having been faithfully compared with their *respective originals, remaining on record in our Court aforesaid. In witness whereof we have caused the seal of our aforesaid Vice-Admiralty Court to be hereunto affixed. Given at La Valetta, Malta, this 8th day of May, in the year of our Lord 1828, and of our reign the ninth.

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"J. LOCKER, Registrar."

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A witness, who had practised for many years in the Vice-Admiralty Court at Malta as a proctor, stated, that the usual course of proceeding in prize causes is, that the ship's papers and affidavits are first brought in before a surrogate, and that the ship's papers disclose who are the owners; after which a monition is directed to be issued, calling upon all persons to appear and make known their claims. This monition is usually stuck upon 'Change. After such monition is returned, the claim is generally made. It is a claim with an affidavit annexed in support of it; and such claim and affidavit shew in whose behalf and what right the claim is made. The claim and affidavit in the present cause are not comprised in the document produced. This cause is taken up from the admission of the claim. The witness stated he was not aware there were any other proceedings in the progress of the cause besides those which appeared in the document produced; and that he believed there were no steps taken before the first which was entered on the document produced, but that it did not contain a transcript of all the acts of Court: there were other acts of Court, such as assigning a proctor for the captors; returning the monition; and the affidavit and claim. He further stated, that he thought the document contained the whole of the proceedings from the monition, and that there would be no other formal adjudication beyond that which appeared on the document produced; that *the monition set forth in the document produced is the last monition, and is served on the agent, if the party cannot be found, and there be an agent regularly appointed: after service of the last monition, an attachment issues if the money be not paid; but an attachment does not issue without service of the last monition on the party, or an agent regularly appointed by him. Before the claim is put in, the captain, mate, and principal officers are usually examined.

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The *Glatton* was paid off in England in October, 1809. Some evidence was given to shew that this judgment was still unsatisfied; and that point was left by the CHIEF JUSTICE to the jury, who found for the plaintiff.

It was agreed that either party was to be at liberty to refer to the proceedings; and the question for the opinion of the Court

was, whether the plaintiff was entitled to recover? If the Court should be of opinion that he was, then the verdict was to stand; if otherwise, judgment of nonsuit was to be entered.

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Stephen, Serjt. for the defendant:†

There are five objections to the plaintiff's recovering in this action.

First, it nowhere appears upon this transcript that the defendant had notice of the proceedings in Malta; on the contrary, it may be inferred, as in *Buchanan v. Rucker*,‡ and *Cavan v. Stewart*,§ that the defendant was never within the jurisdiction of the Court. Now in *Buchanan v. Rucker*, which was an action upon a judgment obtained against the defendant in the island of Tobago, the Court held the proceedings invalid, because it did not appear that the defendant had ever been in the colony, had property there, or was subject *to the jurisdiction of the colonial Court; and in *Cavan v. Stewart*, where the defendant was sued on a Jamaica judgment, Lord ELLENBOROUGH said, that it ought to have been proved that, at least, he was once in the island of Jamaica.

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Secondly, the transcript offered by the plaintiff of the proceedings in the Vice-Admiralty Court is a document too imperfect for this Court to proceed on. If the plaintiff was not bound to set forth the whole of the proceedings, at least he should have set forth the parts material to his own case; as, for instance, the appearance of the defendant or the appointment of a proctor to act for him: above all, the judgment of the Court, which is nowhere stated. It lies on the plaintiff to make the proper extracts, or to shew the whole of the proceedings, and that they are conclusive against the defendant: *Plummer v. Woodburne*.||

Thirdly, it does not appear that these proceedings were final in the Vice-Admiralty Court. According to the definition in Brown's Civil Law, p. 494, a sentence is interlocutory where a further sentence is to be expected. Upon this transcript it appears that many points remain to be adjudicated, and there is no finding

† For the sake of avoiding repetition, the argument for the defendant is stated first, although the plaintiff's counsel commenced as usual.

‡ 9 R. R. 531 (9 East, 192).

§ 1 Stark. 525.

|| 4 B. & C. 625.

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that any precise sum is due from the defendant. In *Emerson v. Lashley*† and *Fry v. Malcolm*‡ it was expressly holden that actions cannot be maintained on a mere interlocutory order. An action on a judgment only lies where a debt or duty can be implied which a court of law can recognise. And in *Carpenter v. Thornton*§ the Court held that a contract could not be implied from a decree of a court of equity (in a suit for specific performance) to pay interest on the purchase-money of an estate. BAYLEY, J. *said, “The foundation of the suit in equity in this case seems to have been an equitable obligation, on the part of the defendant, to pay the money. This action, if it can be maintained at all, must be founded upon a legal obligation to pay. The decree in equity merely ascertains that the defendant is under an equitable obligation to pay; it does not go further, and shew that there is any legal obligation to pay.” And HOLROYD, J. said, “In the case of judgments of inferior Courts, and Courts not of record, where the law implies a promise to pay, it is to pay a legal debt. Wherever there is a debt at law, the Court will presume that the party promises to do that which the law requires. When the debt is founded upon equitable considerations alone, it may be enforced by the authority of the Court which ordered it to be paid. The law, in such a case, does not imply a promise. There is no instance of an action brought on a rule of Court for payment of money. The mode of enforcing such an order is by attachment, for contempt in not obeying the order of the Court. Now, although that does not absolutely shew that such an action is not maintainable, yet, where no such action has ever been maintained, it lies on the party bringing such action to state a clear principle on which it is maintainable.” In *Henly v. Soper* there was a balance of account and an agreement to refer, from which a promise to pay might be implied, and Lord TENTERDEN said, that the action would lie for the balance of an account, but not on every order of a Court. In *Smith v. Whalley*¶ there was also an agreement.

Fourthly, it nowhere appears upon the transcript in what right

† 3 R. R. 370 (2 H. Bl. 248).

‡ 4 Taunt. 705.

§ 22 R. R. 299 (3 B. & Ald. 52).

|| 8 B. & C. 16; 2 Man. & Ry. 153.

¶ 2 Bos. & P. 482.

Mattei acted, or that he had any interest in the subject of the suit. It is rather to be collected that he was a mere agent of the Government whose rights *had been violated by the capture of the ship in question; such agents being usually parties to suits of this kind: *Twee Gebroeders*;† but that would give neither to him nor to his administrator any interest in the sum now sought to be recovered. Thus in *Pigott v. Thompson*,‡ where A. agreed in writing to pay the rent of certain tolls which he had hired, “to the treasurer of the commissioners;” it was held, that no action for the rent could be maintained in the name of the treasurer. And this Court may examine and impeach the legality of foreign judgments: *Arnot v. Redfern*,§ *Walker v. Witter*.||

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Fifthly, this is in effect a question of prize or no prize, over which the Court of Admiralty has exclusive jurisdiction. Thus in *Le Caux v. Eden*¶ it was held that an action would not lie at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship had been acquitted. And WILLES, J. said, “I am of opinion that the action is not maintainable. I may perhaps go upon narrower ground than the rest of the Court, but the rule I would lay down is, that, where the injury is the necessary and natural consequence of the capture, the Court of Admiralty has the sole and exclusive jurisdiction.” And BULLER, J. said, “There is no case in which it has ever been holden that such an action would lie; and, if it could be maintained, there are, in every war, such frequent opportunities for it, that it must have happened in every day’s practice, or some instances, at least, must have been in the memory of those who have had long experience in Westminster Hall; but there is not the smallest trace of such a *determination, or even *dictum*, in any Court in England.”

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(ALDERSON, J.: In *Le Caux v. Eden* the Court were called on to draw an inference from the foreign judgment, namely, that the party was entitled to damages: here we are only asked to enforce the payment of the sum specified in the monition.)

† 3 Rob. 162.

‡ 3 Bos. & P. 147.

§ 3 Bing. 351.

|| Doug. 1.

¶ Doug. 594.

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But that involves the original question of prize or no prize. The principle established in *Le Caux v. Eden* was acted on in *Mitchell v. Rodney*[†] and *Sinclair v. Fraser*, there cited.

Wilde, Serjt. *contra* :

1. It sufficiently appears on this transcript that the defendant had notice of the proceedings of the Court of Vice-Admiralty, and was properly subjected to its jurisdiction. Indeed in the suit in that Court he must have been the actor, and have required the appearance of the parties interested in the captured vessel. That vessel is alleged to have been taken by the *Glatton*, of which the defendant was the commander. Now it is the duty of the captor to proceed to condemnation: 33 Geo. III. c. 66; Case of *The William*, § *The Huldah*, || *The Susanna*; ¶ he is the only person liable for damages; and his acts bind all persons under him: *Diligentia*; †† and upon the evidence before this Court, the monition appears to have issued in a proceeding in the Court of Vice-Admiralty for the condemnation of the *Madonna*. Every thing incidental to such a proceeding, such as the appointment of proctors, the examination of evidence, and all that precedes the sentence of the Court, must be presumed to have been rightly done. The Court must be accredited for the due observance of its own practice; and as the suit could not have existed except upon the captor or his agent proceeding

[*348] *for condemnation, it sufficiently appears that he had notice of the suit, and was within the jurisdiction of the Court.

2. The Court of Vice-Admiralty receiving credit for the correctness of its intermediate proceedings, the monition, which is equivalent to a writ of execution, refers to the judgment of the Court, and sufficiently establishes the existence and amount of a debt, the payment of which this Court will enforce. It is no doubt necessary that a certain amount should be shewn: *Hall v. Odber*; ††; but when that is established, it is for the defendant to impeach, if he can, the regularity of the judgment: *Galbraith v. Neville*; §§ and the plaintiff is not bound to set

† 2 Br. P. C. 423.

‡ Repealed, 27 & 28 Vict. c. 23.

§ 4 Rob. 214.

|| 3 Rob. 235.

¶ 6 Rob. 48.

†† 1 Dods. 404.

‡‡ 10 R. R. 443 (11 East, 118).

§§ Cited in 4 T. R. 191.

out the whole proceedings: *Appleton v. Lord Braybrook*.† In *Buchanan v. Rucker*, and *Cavan v. Stewart*, it appeared on the proceedings that parties entitled to notice had never been summoned to appear; though that would not invalidate a judgment where by the law of the country the Court had authority to proceed in the absence of the party: *Douglas v. Forrest*;‡ but here the defendant Bligh, being the actor in the Vice-Admiralty Court, was the person to summon, not to be summoned.

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3. The proceedings, as set out on this record, are not interlocutory in the sense in which that term is used in English law, but final and conclusive. Restoration of the captured vessel is ordered, and a sum to be paid for the damages of detention. Nothing further was to be expected from the Court, which is the test that the proceeding is at an end, and the judgment, though termed interlocutory in the civil law, has the effect of a definitive sentence. “*Illud dicitur decretum interlocutorium, habens vim sententiæ definitivæ, quando illud decretum est *finale et non speratur alia sententia seu aliud decretum super illo articulo, re, vel causâ, sed per illud imponitur finis illi rei de quâ interlocutum est.*”§ That is, on the main point of the suit, for the question of costs is incidental to every judgment, and does not affect its conclusiveness on the point to be decided. The 33 Geo. III. c. 66, s. 28, expressly enacts, that the decisions of Admiralty Courts shall have the force of a definitive sentence. If so, the amount of damages awarded, which is sufficiently disclosed by the monition, is a legitimate cause of action in the Courts of this country. In Gilbert’s treatise on debt,|| it is laid down “that the act of law, that is, the judgments or acts of courts of justice, may reduce men’s acts of any sort to a certain value, whether they be acts of benefit, or of injury and injustice. And when a certain value is set upon such action, it creates a debt to the party to whom it is by law appointed, for, though there be no actual contract, yet the debt arises *ex quasi contractu*; for as it is common justice to repair injuries, so when the law has settled the compensation of the injury, the law supposes a contract engaging

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† 18 R. R. 294 (6 M. & S. 34).
‡ 29 R. R. 695 (4 Bing. 686).

§ Oughton, ord. Judic. tit. 123.
|| Gilbert’s Law and Equity, 390.

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the party to make a compensation. Besides, the law being the common rule to settle all disputes, when once the *quantum* of the damage or injury is adjusted by the decision of one of its Courts, that decision or judgment ought in right reason to create a debt, as much as if the parties themselves had chosen arbitrators to determine between them, who had awarded a certain sum of money, which, as has been already observed, might be recovered by an action of debt." So Blackstone says,† "That if one hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an action of *debt upon this judgment, and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." The principle, therefore, laid down by Lord TENTERDEN in *Carpenter v. Thornton*, that an action on a judgment only lies where the Court can review the grounds of the judgment, appears too narrow, for that would exclude actions on judgments of record. Even in *Carpenter v. Thornton*, Lord TENTERDEN takes a distinction between the judgments of Courts in this country and those of foreign Courts. The decision in *Henly v. Soper* shews that it was not intended to lay down the principle so broadly as it appears in *Carpenter v. Thornton*. There it was held that an action would lie upon the decree of a colonial court of equity for the balance of an account between partners. In such action the Court would look at the substance, without regarding the form of the proceedings upon which the decree was founded. And Courts here do not exact the proof of strict regularity in the proceedings of foreign Courts. In *Molony v. Gibbons*‡ the Court assumed that the attorney in the foreign Court was well appointed; and if the judgment in such a Court appear to be final, *Bernardi v. Motteux*,§ it has always been held that an action lies here for the amount: *Walker v. Witter*.

4. Whether Mattei was the person entitled to claim damages

† 3 Comm. 159.

‡ 11 R. R. 778 (2 Camp. 502).

§ Doug. 575.

|| Doug. 1.

was altogether a question for the Court of Vice-Admiralty, *Sinclair v. Fraser*,† which cannot be presumed to have erred so far as to have admitted improper parties to the suit;

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5. And the less, as that Court has undoubtedly exclusive jurisdiction in the question of prize. So that the Courts here will not interfere by prohibition, even if they take a view of the law on that subject different from the view taken by the Admiralty Court: *Lord Camden v. Home*;‡ and whatever is incidental to such a question, as the amount of damage or the like, can also only be tried there: *Faith v. Pearson*,§ *Smart v. Wolff*;|| but when the amount to be paid has been once ascertained, a debt is established, the discharge of which the Courts here will enforce by the same remedies as any other debt.

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TINDAL, Ch. J.:

Shaped as these proceedings are, the Court cannot with sufficient certainty see on the face of them that which is necessary to make the defendant liable in this action; and what weighs most with me is, that the defendant nowhere appears to have been brought within the jurisdiction of the Vice-Admiralty Court, but that the proceedings, as set out, are upon the face of them imperfect. The only mention of the defendant is where the captured vessel is styled "*La Madonna della Lettera*, taken by his Majesty's ship of war *Glatton*, George Miller Bligh, Esq. commander, and brought to Malta." Now that mode of expression does not convey the idea that Bligh was present on the occasion of the proceedings in the Court at Malta, for a captured vessel is commonly sent to port for condemnation in charge of a prize master. Neither does it appear that he was present in October, 1810, when application was made for a monition; for it is granted upon an allegation that the proctors had made "repeated applications to the captor's agent for the payment of the amount of the special damages as confirmed, but that they had not been able *to obtain the same." On the contrary, it appears, from the

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† 20 Howell's St. Tr. 468.

§ 16 R. R. 649 (6 Taunt. 439; 2

† 1 H. Bl. 476; 4 T. R. 382; 6 Marsh. 133).

Br. P. C. 203.

|| 3 T. R. 323, 343, 345.

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language of the return to the monition, that he was not present, the deputy marshal certifying that "the monition was not served on the within-named George Miller Bligh, by reason of his having left the island some time ago, and that he has not at present returned to Malta." It is left in uncertainty when he quitted the island, and we may fairly infer that if it had been possible, it would have been stated on the proceedings that he was present. But I do not rely on that alone, for his personal attendance was not strictly necessary, and it was, as has been forcibly urged, his duty to proceed to a port for the due condemnation of the captured vessel. Still there was something to be done in the Admiralty Court on his part and with his authority; the appointment of a proctor ought to have been properly authenticated; and if that took place, I cannot see why the statement of it is omitted on this transcript. A proctor has much more power than an attorney; he is styled *dominus litis*; he is appointed with solemnity by an instrument under seal, or by the Judge; and his appointment is a matter of record: Clerke's Praxis, 2nd part. It appears, on this transcript, that all the proceedings of the Court have not been set out, for it recites, "The Judge having pronounced the goods to belong as claimed, and by interlocutory decree the same to be restored to the claimant for the use of the owners and proprietors;" but this interlocutory decree is nowhere set out. Now it was the business of the plaintiff at least to make the necessary selection for the information of this Court; and the fair inference from the omissions is, that the whole of the proceedings, if set out, would not have shewn the appointment of any proctor for Bligh. It further appears that no agent of Bligh's resided in Malta. The monition indeed is served on Robertson, but in the next proceeding it is stated that **Jackson* appeared for him, and "alleged him not to be the agent of his Majesty's ship *Glatton*, and that he was not in possession of any effects belonging to the said ship." This allegation is not contradicted, but thereupon the proceedings terminate; from which we must infer that the applicants were incompetent to deny the allegation of *Jackson*, and that Robertson must be taken not to have been the agent of the defendant. If so, the

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proceedings against him have been carried on when neither he was present nor any proctor or agent to attend to his interests. And though the plaintiff has set out the monition, which is in the nature of a writ of execution, he has nowhere stated the judgment on which that monition is grounded. When the plaintiff had the power of producing the proceedings which have been thus withheld, we should proceed in the dark if without more precise information we were to hold the defendant liable. It is of extreme importance that the plaintiff should be held strictly to the proof of his claim, for the consequences would be serious to the defendant if he should be held liable to this demand after a lapse of twenty-two years; when he can neither investigate the claim nor recover over from parties who originally might have been liable to contribute. The ground of my decision, however, is, that I do not see my way on these proceedings, which are manifestly so imperfect, to find the defendant liable. On that ground alone I think there ought to be judgment of nonsuit.

PARK, J. :

It is not necessary for us to proceed on any other ground than the glaring defect of these proceedings. No libel is stated, no responsive allegations. It does not appear for whom Mattei claimed, nor what was the judgment on the subject of damages; the monition is ordered to be served on Bligh or his agent, and it is served on Robertson, who disclaims being *agent, or having any effects of the captors. In short, the whole proceedings are so imperfect that it is impossible for us to come to any decision on them, and after a lapse of twenty-two years, the case has an extremely suspicious appearance.

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GASELEE, J. :

I think there can be no doubt of the authority of this Court to entertain the plaintiff's suit, if the judgment in the Vice-Admiralty Court had been properly set out; for that judgment appears to have been final. And as to the appearance of the defendant Bligh, there is a great deal in the argument, that he, as captor, was bound to take the cause into the Court at Malta :

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but the ground of my decision is, that this transcript discloses no decree for the payment of any specific sum: for the monition is no part of the judgment; it is either the equivalent of a writ of execution, or a prelude to it by way of attachment; and this Court cannot consider an instrument in such a form as sufficient evidence of a judgment to the same amount. The transcript, therefore, being defective in not stating a decree for any specific amount, the plaintiff has failed to establish any cause of action, and a nonsuit must be entered.

ALDERSON, J. :

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I am of the same opinion. The proceedings, as set out, are too imperfect to enable us to give any judgment but that of nonsuit. The plaintiff sues as administrator of Mattei, and should, therefore, shew who Mattei was, and in what right he claimed. But many important parts of the proceedings are not set out, such as the appointment of a proctor for the defendant Bligh, and the statement in detail of Mattei's claim. The Court directs the restoration of part of the cargo, and refers it to a body of merchants to ascertain the amount of damage, if any, sustained by the owners of the property. The report of the merchants is stated *to have been afterwards confirmed, but what the report was nowhere appears, nor the amount found to be due for damages; for the monition cannot be taken as part of the judgment of the Court, or evidence of the sum specified in the decree. If the proceedings stopped there, they would be too imperfect for us to rest any decision upon them, but the monition ordering that a certain sum shall be paid by the agent of the captor, is served upon Robertson, who disclaims the agency, or that he has any effects belonging to the *Glatton*, and what is done after that does not appear. It is perfectly consistent with all that appears on this record, that another monition may have issued, and that the money may have been paid. The proceedings set out, being therefore so imperfect, the Court has no alternative but to pronounce

Judgment of nonsuit.

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AND OTHERS.

1832.

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(8 Bing. 394—401; S. C. 1 Moore & Scott, 646; 1 L. J. (N. S.) C. P. 112.)

Since 9 Geo. IV. c. 92,[†] an action does not lie against the trustee of a savings bank. In case of disputes, the only mode of proceeding is by arbitration.

THIS was an action of assumpsit against the defendants, as trustees of the Mildenhall bank for savings, for money had and received by them to the use of the plaintiff. At the trial before Tindal, Ch. J., Middlesex sittings, 1830, a verdict was found for the plaintiff for 44*l.*, subject to the opinion of the Court on the following case:

In April, 1818, a savings bank was established at Mildenhall, in the county of Suffolk, under the provisions of 57 Geo. III. c. 130. Rules were drawn up which, in the same year, were duly enrolled with the clerk of the peace, and afterwards acted upon. The defendants, with others since dead, were duly appointed trustees, and acted as such; but William Newton, who is still living, though not made a defendant, was also a trustee, and acted. Sir Henry Edward Bunbury, one of the defendants, who resided at Mildenhall, was also duly appointed, and acted as treasurer, and W. Bassett another of the defendants, as manager. One William Gill was duly appointed clerk in the year 1818, and continued to act in that capacity until 1825, when it was discovered that he had embezzled a considerable sum of money, the amount of deposits which had been received by him. He absconded, and was prosecuted by the trustees to conviction, and transported. Bassett from time to time received deposits of the plaintiff, and duly signed his book in which such deposits were regularly entered, but he never saw Crisp's account

[†] Repealed by 26 & 27 Vict. c. 87, and S. L. B. Act, 1873. But the decision lays down a principle which has been repeatedly followed in regard to societies constituted under Acts having a similar provision. See *Municipal Permanent Investment Building Society v. Kent* (H. L. 1884) 9 App. Cas. 260, especially *per* Lord BLACKBURN,

p. 275, 53 L. J. Q. B. 290, 299. And see *Caledonian Ry. Co. v. Greenock, &c. Ry. Co.* (H. L. 1874) L. R. 2 H. L. Sc. 347. Compare *Mulkern v. Lord* (1879) 4 App. Cas. 182, 48 L. J. Ch. 745; *Western, &c. Building Society v. Martin* (1886) 17 Q. B. Div. 609, 55 L. J. Q. B. 382.—R. C.

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in the possession of the clerk, or attended at the clerk's office after March, 1819; the clerk having told him that he *would give him notice when it was necessary for him to attend. On Gill's absconding, Bassett went to his house, and there found two cash account books, one a false and the other a true one; in each of which the plaintiff's account with the bank was entered, from which it appeared, that on the balance in the hands of the clerk, the plaintiff's claim in June, 1824, was 35*l.* 8*s.* 3¼*d.* The entry of the account in both books was precisely similar, except that in the false book the word "paid" was added at the end of the account, importing that the whole balance had been paid to the depositor. It was admitted that the receipts and payments on account of deposits were as appeared by the account; and that the plaintiff had not received the balance of the account. A letter was, on the 27th of June, 1829, sent by the plaintiff's attorney to the defendants, to W. Newton, and various others, which, after alluding to the embezzlement and conviction of the clerk, and expressing a hope that an amicable adjustment of the claims of the several depositors might be effected, gave notice to the defendants and others, that the plaintiff had appointed Mr. C. Austin, of the Temple, barrister, to be his referee, and called on the defendants, within a month to appoint a referee on their behalf, both in the matter of Crisp, and the other depositors. Sir H. Bunbury was then abroad, and did not return to England till after the action was brought. No arbitrator had ever been appointed by the managers or trustees, they altogether denying their liability, and it being admitted that they had no funds in hand to satisfy the plaintiff's claim. It was admitted that general meetings to receive the reports, and to examine and audit all the accounts of the establishment, were not held pursuant to the first rule of the institution. The plaintiff went, about the time Gill absconded, to his house, for the purpose of making a formal demand, but *he found the premises shut up, and that Gill had absconded.

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Among the rules of the society were the following: First, "The affairs of the bank shall be conducted by not less than six trustees, twenty managers, and a treasurer; none of whom shall derive any benefit from the deposits, or receive any

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remuneration for services. Every trustee will be considered as an honorary manager. General meetings shall be held on the first Friday in October, January, April, and July, to receive the reports, and to examine and audit all accounts of the establishment. The managers shall also have the power of filling up vacancies, and of adding to the numbers of trustees, and of their own body. Upon the requisition of three managers, a special meeting may be called, upon giving fourteen days' previous notice. At every general meeting, one trustee and four managers shall be competent to act." Seventeenth; "Any matter in dispute between this institution and any person acting under the same, and any depositor therein, or any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, shall be referred to the arbitration of two persons; one to be named by the managers, and the other by the claimant: and in case the two persons so named shall not agree, they shall forthwith nominate an umpire, and the decision and award of such referees and umpire shall be final and binding upon both parties." And by 9 Geo. IV. c. 92, s. 45, it is enacted, "That in case any dispute shall arise between any such institution or any person or persons acting under them, or any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister-at-law *to be appointed

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The case was argued in Hilary Term by

Storks, Serjt. for the plaintiff, and *Taddy*, Serjt. for the defendants, who took several objections to the plaintiff's recovery; in particular, that the defendants, as honorary trustees, were not responsible for embezzlement by the clerk of the society; and that, at all events, the plaintiff's remedy was not by action, but by arbitration. The decision of the Court turns on the latter

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ground alone; as to which, it was contended on the part of the plaintiff, that the statute 9 Geo. IV. c. 92, s. 45, is directory only with respect to arbitration, not imperative; that parties cannot, by agreement, oust the courts of law of their jurisdiction; nor can a statute effect this, except by express words or necessary implication: *Cates v. Knight*;† and that, at all events, the defendants having refused to proceed to arbitration, could not now object that the plaintiff had proceeded at law.

On the part of the defendants it was argued, that though parties cannot, by agreement, oust the jurisdiction of the courts of law, it may be ousted by statute; and that the statute 9 Geo. IV. c. 92, s. 45, is imperative in this respect, the object of the Legislature being to protect the funds of poor contributors from more expensive litigation.

Cur. adv. vult.

TINDAL, Ch. J.:

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This is an action of assumpsit against the defendants, as trustees of the Mildenhall bank for *savings, and is brought for money had and received by them to the use of the plaintiff. This bank was established in the year 1818, under the rules and regulations set out in the case; and from that time, until the passing of the statute 9 Geo. IV. c. 92, was governed by the various provisions contained in the statute 57 Geo. III. c. 130. But that statute, with certain other Acts which had been passed for amending it, were repealed by the 9 Geo. IV. c. 92, with an exception, that nothing in that Act contained should invalidate or annul any payments, agreements, or appointments made, or proceedings had, or any instruments executed under the authority of any of the repealed Acts; and by the last section of the 9 Geo. IV., that statute is declared to extend "to all savings banks established, and hereafter to be established, in England and Ireland." It appears, therefore, to us, that the only law which governed and regulated the rights of the parties to this action at the time the action was brought, is to be derived from the only statute then in existence in relation to the subject-matter of the action, namely, the 9 Geo. IV.

Amongst the objections that have been urged by the defendants

† 3 T. R. 442.

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against the right to maintain this action, one is, that by the forty-fifth section of the last statute, the Legislature has provided, "That in case any dispute shall arise between any such institution, or any person or persons acting under them, and any individual depositor therein, the matter so in dispute shall be referred to the arbitration of two indifferent persons, to be chosen and appointed in the manner therein pointed out: and, in case of their not agreeing, then to the barrister-at-law to be appointed by the commissioners, as directed by the Act; and whatever award shall be made by the said arbitrators, or the said barrister, shall be binding and conclusive on all parties, and shall be final to all intents and purposes without any appeal:" and it is *contended, on the part of the defendants, that this enactment is imperative upon the plaintiff, taking away the jurisdiction of the courts of common law, and leaving the party who complains no other mode of determining his claim than that which is pointed out and provided by the Act. It is not denied, on the part of the plaintiff, that the present case falls within the description of those contained in the forty-fifth section; indeed, it would be impossible to argue that the present is not a dispute between persons acting under the institution and an individual depositor: but it is contended by the plaintiff, that the jurisdiction of the courts of common law is not ousted by any words to be found in this section; and that the utmost which the section contemplates is, to create a concurrent, and not an exclusive jurisdiction in the arbitrators or barrister. But we are of opinion, that both with reference to the words of the statute, and the object which it had in view, the plaintiff is barred from maintaining the present action in a court of law, and must pursue the remedy provided by the statute. It is undoubtedly true, that the jurisdiction of the superior Courts of Westminster is not to be ousted, except by express words, or by necessary implication: *Cates v. Knight*; yet, where the object and intent of the statute manifestly requires it, words that appear to be permissive only, shall be construed as obligatory, and shall have the effect of ousting the Courts of their jurisdiction, as in the case last referred to, where a clause enacted that it "shall and may be lawful for a justice of peace to hear and determine

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offences against the Act that subject the offender to penalties, not amounting to 50*l.*," with a power to the justices to mitigate the penalties; whilst the same Act directed that all penalties which amount to 50*l.*, or more, shall be sued for in his Majesty's Courts at Westminster; it was held, that by necessary implication the Courts above were ousted of *their jurisdiction in the case of penalties not amounting to 50*l.* Now, in this case the Legislature has enacted that disputes of the description of the present "shall be referred,"—words which, in their natural force, denote an obligation, not a permission only; and unless these words are construed to be compulsory on the plaintiff, they mean nothing. If they are not compulsory on the plaintiff, neither can they be so, upon any principle of fair construction, upon the defendant. And if recourse to arbitration is not intended except both parties choose to adopt it, then indeed the Act is made a dead letter; for it would be competent for both parties to refer the dispute to arbitration, if they both agreed upon it, without the intervention of the statute. In order, therefore, to give these words of the statute any force or operation, the word "shall" must be construed as obligatory, that is, that the matter in dispute shall of necessity be referred to arbitration, and not be determined in any of the Courts of Westminster Hall. But looking at the object and intention of the Legislature, we think it clear that the remedy by action is taken away, and that by arbitration substituted in its place. These institutions were intended to comprehend a very large number of depositors, chiefly from the lower walks of life; many of them contributing very small sums, and claiming very small profit by the addition of interest. On the other hand, the trustees and managers are uncertain in point of number. To allow, therefore, actions at law to be maintainable by each depositor against the trustees, upon the occasion of every dispute with the institution, either as to the amount of the balance due, or the interest claimed by him, would be, in effect, to cause the ruin both of the depositors and the institution, by casting the costs of an action in the superior Courts at Westminster upon the losing party. No person would fill the gratuitous office of a trustee or a manager, if he *was exposed to the hazard of suits at law at once so expensive and

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so numerous; no depositor would be able to enforce his just rights, if he must sue in the superior Courts, at the hazard of being defeated with heavy costs if he sued more of the trustees than he might be able to prove liable; or subject to have his suit abated if he sued too few. It is evident, therefore, that the Legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes by a reference in the mode pointed out in the Act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object,—serviceable alike to the depositors and to the institution,—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior Courts.

In this view of the case, it would be improper to give an opinion on the other points which were made in argument, as we have no jurisdiction: and we can only express our surprise and regret that the defendants, who set up this as a ground of defence, did not act upon it when the plaintiff appointed an arbitrator on his part. At present, however, there must be

Judgment for the defendants.

GARTH v. HOWARD AND FLEMING.

(8 Bing. 451—454; S. C. 1 Moore & Scott, 628; 1 L. J. (N. S.) C. P. 129; S. C., at Nisi Prius, 5 Car. & P. 346.)

1832.
May 11.
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The declarations of a shopman are not evidence against his employer, unless made in the course of his employer's business.

DETINUE for plate. Plea, general issue. At the trial before Tindal, Ch. J., it appeared that Howard had, without authority, pawned, for 200*l.*, certain plate belonging to the plaintiff. The defendant, Fleming, was a pawnbroker; but the only evidence to shew that the plate had ever been in his possession, was a witness, who stated that, at the house of the plaintiff's attorney, he heard Fleming's shopman say that it was a hard case, for his master had advanced all the money on the plate, at 5 per cent.

This evidence being objected to, was received, subject to a motion to this Court; and a verdict having been given for the plaintiff,

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Andrews, Serjt. obtained a rule *nisi* for a new trial, on the ground, among other objections, that the declarations of an agent can only be received in evidence when they have been made in the ordinary course of his employer's business; and that it is not in the course of a pawnbroker's business to lend 200*l.* on a single pledge, or at 5 per cent. interest.

Spankie, Serjt. shewed cause :

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The declaration of the shopman was made in the ordinary course of his employer's business : for that business was to lend money *on pledges, and the amount of the pledge, or of the interest paid, are immaterial. Now it is established by *Rex v. Almon* † that the law presumes a master to be acquainted with the acts of his servant in the course of his business ; and slight evidence is sufficient to establish the fact of agency : *Hazard v. Treadwell*.‡ The declarations of Fleming's shopman, therefore, being within the scope of his authority, *Schumack v. Lock*,§ are conclusive against his employer.

Andrews :

The business, which Fleming's shopman is alleged to have spoken to was, in effect, a private loan, and not the transaction of a pawnbroker's shop. It is inexpedient to extend the exception by which the declarations of agents are received in evidence on hearsay ; and in *Maesters v. Abraham*,|| Lord KENYON refused to admit even the letter of an agent as evidence of an agreement by his principal. Such evidence, if received, ought at least to be confined to declarations at the time of the transaction. In *Helyear v. Hawke* ¶ it was expressly determined that the principal is not bound by the representation of the agent at another time.

Cur. adr. vult.

TINDAL, Ch. J. :

The rule in this case has been obtained upon two distinct grounds : but it is unnecessary to give an opinion upon any other than this, namely, whether the declaration of the shopman of the defendant Fleming, that the goods were in the possession of

† 5 Burr. 2686.

|| 1 Esp. 375.

‡ 1 Str. 506.

¶ 5 Esp. 72.

§ 10 Moore, 39.

his master, was admissible: for it is clear that, unless Fleming is to be affected by such declaration, he is entitled to the verdict upon the general issue, *non *detinet*. If the transaction out of which this suit arises had been one in the ordinary trade or business of the defendant as a pawnbroker, in which trade the shopman was agent or servant to the defendant, a declaration of such agent that his master had received the goods, might probably have been evidence against the master, as it might be held within the scope of such agent's authority to give an answer to such an enquiry made by any person interested in the goods deposited with the pawnbroker. In that case, the rule laid down by the MASTER OF THE ROLLS in the case of *Fairlie v. Hastings*,† which may be regarded as the leading case on this head of evidence, directly applies. But the transaction with Fleming appears to us, not a transaction in his business as a pawnbroker, but was a loan by him as by any other lender of money at 5 per cent. And there is no evidence to shew the agency of the shopman in private transactions unconnected with the business of the shop. I doubted much at the time whether it could be received, and intimated such doubt by reserving the point; and now, upon consideration with the Court, am satisfied that it is not admissible. It is dangerous to open the door to declarations of agents, beyond what the cases have already done. The declaration itself is evidence against the principal, not given upon oath: it is made in his absence, when he has no opportunity to set it aside, if incorrectly made, by any observation, or any question put to the agent; and it is brought before the Court and jury frequently after a long interval of time. It is liable, therefore, to suspicion originally, from carelessness or misapprehension in the original hearer; and again to further suspicion, from the faithlessness of memory in the reporter, and the facility with which he may give an untrue account. *Evidence, therefore, of such a nature, ought always to be kept within the strictest limits to which the cases have confined it; and as that which was admitted in this case appears to us to exceed those limits, we think there ought to be a new trial.

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Rule absolute.

† 10 Ves. 123.

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KINGSFORD v. MARSHALL.†

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(8 Bing. 458—465 ; S. C. 1 Moore & Scott, 657 ; 1 L. J. (N. S.) C. P. 135.)

Upon the ebbing of the tide, a vessel took the ground in a tidal harbour, in the place where it was intended she should ; but, in so doing, struck against some hard substance, by which two holes were made in her bottom, and the cargo damaged : Held not a stranding for which the underwriters were liable upon an insurance on corn warranted free from average, unless general, or the ship be stranded.

THIS was an action on a policy of insurance on wheat on board the ship *Lady Anne*, at and from London to Dunkirk. The policy contained the usual memorandum, by which corn, &c. was warranted free from average, unless general, or the ship be stranded. The plaintiff declared for an average loss upon the wheat by the stranding of the ship. At the trial before Tindal, Ch. J., London sittings after last Michaelmas Term, the only question that arose was, whether there was a stranding of the ship or not? As to which, the facts were as follow : Dunkirk harbour is a tide harbour, being nearly dry at low water. The ship entered the harbour about the time of high water, and was moored fore and aft to the shore, by order of the harbour master, in a place pointed out by him, where other vessels had been moored ; and was also fastened by a running tackle from the mainmast head to a post on the shore, for the purpose of preventing the ship from settling over as the tide fell. Whilst the tide was ebbing, and before the ship took the ground, though as to the precise time there was contradictory evidence, the rope of the running tackle broke ; and after the ship had settled, it was discovered, that, in taking the ground, she had struck against some hard substance, by means of which two holes were made in the bottom of the ship, in the second or third streak from the keel, and the water flowing through these holes had injured the ship, and also done considerable damage to the cargo. Upon the fact, whether the ship took the ground precisely in the place and in the manner she would have done, if no accident had happened to the rope, there was contradictory evidence : and the jury were directed, that if the *ship took the ground merely in consequence

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† Followed in *Letchford v. Oldham* (1880) 5 Q. B. Div. 538, 49 L. J. Q. B. 458.—R. C.

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of the ebbing of the tide, and at the very place where it was intended she should at the time she was moored, then there was no stranding within the meaning of the policy; but if, in consequence of the breaking of the rope, or any other casualty, the ship took the ground, not in the place where it was intended she should settle by the ebbing of the tide, but in some other and different place, then there was a stranding. The jury found for the defendant; thereby, in effect, declaring that the ship had taken the ground merely through the ebbing of the tide, and in the very place where it was intended she should, and negating that from the breaking of the rope, or any other accident, she had settled in a different place.

Taddy, Serjt. obtained a rule *nisi* for a new trial, on the ground of an alleged misdirection, contending that in cases of this kind, the question is, whether or not the loss takes place in the ordinary course of navigation: that this loss did not take place in the ordinary course of navigation; for though it was in the ordinary course that a vessel should take the ground in Dunkirk harbour, it was not in the ordinary course that she should settle down upon a large stone which should perforate her bottom. The jury, therefore, should have been told that this was a stranding for which the underwriter was responsible. Thus, in *Fletcher v. Inglis*,† where a transport in Government service, insured for twelve months, was ordered into Boulogne harbour, the bed of which is hard and uneven, and, the tide having left her, received damage by taking the ground; it was held, that that was a loss by the peril of the sea. So, in *Rayner v. Godmond*,‡ in the course of a *voyage along a canal, it became necessary, in order to repair the canal, to draw off the water; the ship, having been placed in what appeared to be a safe situation when the water was drawn off, impinged by accident upon some piles, the existence of which was not previously known: and this was held to be a stranding within the usual memorandum in the policy.

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Wilde and Stephen, Serjts. shewed cause in Hilary Term:

This was a stranding in the ordinary course of navigation, for

† 20 R. R. 448 (2 B. & Ald. 315).

‡ 24 R. R. 335 (5 B. & Ald. 225).

KINGSFORD which the underwriter is not responsible; and *Hearne v.*
 v. *Edmunds*† is in point. There, a vessel in charge of a pilot,
 MARSHALL. going up Cork harbour, took the ground in the ordinary course
 of navigation, and afterwards, when moored at a quay, on the
 ebb of the tide took the ground, fell over on her side, and was
 injured; and it was holden, that that was not a stranding, for
 which the insurer was liable.

In *Fletcher v. Inglis* the loss was not occasioned by the vessel's
 taking the ground, but by succussion on the reflux of the tide;
 to which she could not have been exposed unless placed in an
 improper position. In *Rayner v. Godmond* the accident did not
 happen in the ordinary course of navigation, for the drawing off
 the water of the canal for repairs was obviously an unusual
 occurrence.

In *Carruthers v. Sydebotham*,‡ a ship being under conduct of
 a pilot was, against the advice of the master, fastened at the pier
 of the dock basin at Liverpool, by a rope to the shore, and left
 there; when the tide retired she fell over on her side and bilged:
 that was held a stranding, for which the underwriters were liable.
 But the fact that the vessel was placed, contrary to the advice of
 the master, in a position which proved fatal to *her, establishes
 that such position was not taken in the ordinary course of
 navigation.

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In *Barrow v. Bell*,§ a ship, in entering a harbour, struck
 upon an anchor, and being thereupon in danger of sinking at her
 moorings, was warped higher up the harbour, where she took the
 ground, and remained fast: this was also held to be a stranding
 within the meaning of the policy; but the blow which rendered
 the stranding fatal, was given by the anchor before the vessel
 took the ground. In *Bishop v. Pentland*,|| where the ship was
 compelled to put into a tide harbour, and was there moored
 alongside a quay, in the usual place for ships of her burden, it
 became necessary, in addition to the usual moorings, to fasten
 her by tackle to posts on the shore, to prevent her falling over
 upon the tide leaving her; and the rope with which she was so

† 21 R. R. 660 (1 Brod. & Bing.
 388). From Lord Ch. J. DALLAS's
 notes of the trial, which *Wilde* now
 produced, it appeared that the bottom

of Cork harbour is hard and stony.

‡ 16 R. R. 392 (4 M. & S. 77).

§ 28 R. R. 468 (4 B. & C. 736).

|| 31 R. R. 177 (7 B. & C. 219).

fastened, not being of sufficient strength, broke when the tide retired, and the vessel fell over upon her side, which was thereby stove in : this was held to be a stranding. But the damage was manifestly occasioned by the negligence of the crew, and not in the ordinary course of navigation.

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In the present case, the jury having found that the accident was not occasioned by the insufficiency of the rope, the stranding could only have occurred in the ordinary course of navigation at Dunkirk harbour.

Taddy :

In the ordinary course of navigation at Dunkirk harbour, vessels are compelled to take the ground ; but they would not enter and do so if the practice exposed them to destruction or injury ; the fact, therefore, that all vessels take the ground there, conclusively shews, that it is not in the ordinary course of navigation that they should be bilged in so doing. The *injury occasioned by the stone, in this case, was as much out of the usual course, as the injury occasioned by the sunken anchor in *Barrow v. Bell*, or the hidden piles in *Rayner v. Godmond*. Though the taking the ground was contemplated by both parties to the insurance, the accident which occasioned the injury was unforeseen, and comes therefore within the scope of the insurance. In *Carruthers v. Sydebotham*, the insurers were held responsible, because, in the judgment of the master, the ship had been placed by the pilot in an improper position : and such was the case here ; for the harbour-master, not the captain, stationed the vessel where the accident happened. The jury, therefore, should have been directed that this loss occurred, not by such a stranding or taking the ground as the parties contemplated, but by an unforeseen accident, the consequence of which was a stranding for which the underwriter was responsible.

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Cur. adv. vult.

TINDAL, Ch. J. (after stating the facts as above,) proceeded :

A rule has been obtained for a new trial, upon the ground of a misdirection to the jury ; but after hearing the argument of counsel against and in support of the rule, we think, upon those

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facts, the direction of the Judge, and the finding of the jury, was right, and that a new trial ought not to be granted. That the injury done to the ship or goods by settling on a hard substance at the bottom of the harbour, would be a damage recoverable on a policy on ship, or a policy on goods not included in the memorandum, as an injury occasioned by perils of the sea, is beyond all doubt. But the question is, whether, as the goods insured fall within those in the memorandum enumerated, the present case is taken out of the exception contained in such memorandum, by reason of the ship being stranded; inasmuch as it has long been *settled that the words "if the ship be stranded" are words of condition, and that if such condition happens, it destroys the exception and lets in the general words of the policy. (See *Burnett v. Kensington*.†) In considering this case, therefore, it will be better to treat the fact, that the damage to the wheat was occasioned by the very act of the ship's taking the ground, as a circumstance altogether immaterial in the determination of the question. For if the ship was stranded in Dunkirk harbour, an average loss upon the whole would be equally recoverable, though it had happened from perils of the sea at any former time, or any other place in the course of the voyage insured. In this point of view it is of very great consequence that the meaning of the word "stranding" should be distinctly understood. Now it is perfectly clear, and has been settled by various decided cases, that by the term "stranding," neither of the contracting parties could intend a taking of the ground by the ship in the ordinary course of navigation used in the voyage upon which she was engaged. It is needless, therefore, to say, that when a vessel, in the course of a voyage insured, is sailing in a tide river, or puts into a tide harbour, the taking the ground from the natural cause of the deficiency of water, occasioned by the ebbing of the tide, is no stranding, within the meaning of the policy. Otherwise, at every ebb of the tide, there would be a stranding; and the memorandum intended for the security of the underwriter against partial losses upon perishable commodities, would be altogether nugatory, as the smallest injury to the cargo, occasioned at an early part of the voyage, would always be a loss within the policy, by reason

† 4 R. R. 424 (7 T. R. 210).

of the ship discharging her cargo in a tide harbour. The mere taking of the ground, therefore, in a tide harbour, in the place intended *by the master and crew, or the proper officers of the harbour, cannot, upon any principle of construction or common sense, be held to constitute a stranding. What more, then, is necessary? We think a stranding cannot be better defined, than it has often been in several of the decided cases, viz. where the taking of the ground does not happen solely from those natural causes which are necessarily incident to the ordinary course of the navigation in which the ship is engaged, either wholly or in part, but from some accidental or extraneous cause. Such was the case in *Carruthers v. Sydebotham*,† where the ship was taken by the pilot who had her in charge, against the direction of the master, and moored in an improper place. Such, also, was the case in *Barrow v. Bell*,‡ where, the vessel having struck on an anchor, whereby she sprung a leak, and being in danger of sinking, was, in consequence, warped further up the harbour of Holyhead, where she took the ground. Such, again, was the case of *Bishop v. Pentland*,§ where, the ship having entered a tide harbour by stress of weather, was moored, fore and aft, with the addition, as in the present case, of a tackle from her mainmast, fastened to posts on the pier to prevent her falling over. The rope, being of insufficient strength, broke, and by means thereof the ship fell upon her side, whereby she was stove in and injured. Such, lastly, was the case of *Wells v. Hopwood*,|| very recently decided in the King's Bench, in which case the ship, having arrived in Hull harbour, was in the course of discharging her cargo at a quay alongside of which she was moored. At low water she grounded on the mud; but on one occasion, the rope by which her head was moored to the opposite side of the harbour stretched, *and the wind blowing from a particular quarter, instead of grounding entirely on the mud, as it was intended she should have done, she partly grounded on a bank of rubbish and stones. This grounding was held, by a majority of the Judges, to be a stranding within the meaning of the policy. Now, all these cases were decided upon the principle, that the taking the

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† 16 R. R. 392 (4 M. & S. 77).

‡ 28 R. R. 468 (4 B. & C. 736).

§ 31 R. R. 177 (7 B. & C. 219).

|| 3 B. & Ad. 20.

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ground was occasioned by some extraneous and accidental cause ; and was not a taking of the ground in the usual course of navigation. We think the attention of the jury, in the present case, was called to the very point to which it ought to have been directed, viz. whether the grounding was such as the master and crew intended, that is, merely by the ebbing of the tide, in the ordinary course of navigation ; or, whether the grounding in the particular spot where she took the ground, was the effect of accident. Upon the facts before them, we think the jury found a right verdict ; and, therefore, the *postea* should be delivered to the defendant.

Rule discharged.

1832.
May 10.

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EX PARTE CHUCK, IN THE MATTER OF STARKEY
AND WHITESIDE, BANKRUPTS.†

(8 Bing. 469—474 ; S. C. 1 Moore & Scott, 615 ; 1 L. J. (N. S.) C. P. 197 ;
1 Mont. & Bligh, 457.)

In July, 1820, W. advanced to S. and S., then carrying on business in partnership as brewers, the sum of 24,000*l.*, and all three executed a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property ; W. however was not to have any definite aliquot proportion of the profits, but was to have an account of the profits as between themselves, so as to get 2,000*l.* or 2,400*l.* a year, as the case might be, out of the clear profits : W.'s name never appeared to the world as a partner :

Held, that W. was a partner ; and the new firm having become bankrupt in 1826, held, that the creditors of the old firm and the creditors of the new firm were both entitled to prove against the property of the new firm.

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In July, 1820, and for some time previous, John Cross Starkey and William Starkey carried on business in partnership as brewers ; when, upon the sum of 24,000*l.* being advanced to them by Whiteside, then a minor, they all three executed a deed, by the express terms *whereof a partnership stock was created, in which they had all a joint property ; Whiteside, however, was

† The effect of the judgment in this case must be considered subject to the observation that the presumption of liability as a partner is altered by the decision of the House of Lords in *Cox v. Hickman* (1860) 8 H. L. C.

268, 30 L. J. C. P. 125 ; so that some of the reasons in the judgment may not now have the same force. There appears, however, nothing in *Cox v. Hickman* to alter the effect of the actual decision.—R. C.

not to have any definite aliquot proportion of the profits ; but was to have an account of the profits, as between themselves, so as to get 2,000*l.* or 2,400*l.* a year, as the case might be, out of the clear profits.

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This deed was confirmed by Whiteside in March, 1821, after he came of age, but his name never appeared to the world as a partner.

In 1826 the Starkeys became bankrupt ; whereupon a question arose, first, whether Whiteside was to be considered a partner ; and, secondly, admitting him to be a secret partner, whether persons who were creditors of the old firm, had, not only a claim against all the property of the new firm, but also a right to prove their debts, to the exclusion of the creditors of the new firm, on the ground, that under the new firm, the Starkeys were the apparent or reputed owners of the whole property, within the meaning of the statute 6 Geo. IV. c. 16, s. 72, having in their possession, order, and disposition, the property of Whiteside, and with his consent.†

At the request of the LORD CHANCELLOR, TINDAL, Ch. J. and LITLEDAL, J. assisted in the decision of these questions,‡ and their united opinion was delivered as follows, in the Court of Chancery, by

TINDAL, Ch. J. :

The first question to be considered is, whether William Whiteside ever became a partner with John Cross Starkey and William Starkey, either as between themselves, or with respect to third persons ; that is, whether there was ever any joint partnership stock belonging to all these three persons. And we are of opinion, that by the deed of July 20th, 1820, confirmed *by that of March 2nd, 1821, which was executed after Whiteside came of age, Whiteside did become a partner with the two Starkeys, both as between themselves, and also with regard to third persons ; that by the express terms of the deed of July 20th, 1820, there was a partnership stock created, in which they had a joint property ; that, although Whiteside had not any definite

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† See S. C. nom. *Ex parte Jennings*,
1 Mont. 45.

‡ For the argument, see 1 Mont. &
Bligh, 364.

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aliquot proportion of the profits, yet that he was entitled to an account of the profits as between themselves, so as to get his 2,000*l.* or 2,400*l.* a year, as the case might be, out of the clear profits; that he was, to all intents and purposes, a partner, though his name did not appear to the world; and that a joint commission against all the three, as such joint partners, might be well supported. Whiteside, then, being thus a partner, but unknown as such to the world, any creditor of the three might, at his election, have maintained an action either against the two Starkeys, the known partners, or against them and Whiteside jointly,[†] as appears by the case of *De Mautort v. Saunders*,[‡] *Ex parte Hamper*,[§] and *Ex parte Norfolk*;|| and if an action had been brought against the three partners, it is clear that the joint effects of the partnership might have been taken in execution. So also, generally speaking, the joint effects of the partnership would be distributable amongst the joint creditors, under a joint commission of bankruptcy against the three. And unless there be something particular in this case to vary it from such general principle, we should be of opinion that the joint creditors of the three are entitled to have the partnership effects divided amongst them. Thus then stands the claim of the joint creditors of the three partners.

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The claim of the creditors of the two Starkeys under the old partnership must next be considered. It is *contended, on the part of those creditors, that after the partnership with Whiteside, who was a secret partner, the two Starkeys, with the consent and permission of Whiteside, who had a share of the joint property, had his interest in such joint property in their possession, order, and disposition, and were reputed owners thereof, and took upon them the sale, alteration, and disposition as owners; and that, under the 6 Geo. IV. c. 16, s. 72, which follows 21 Jac. I. c. 19, s. 11, they are entitled to have the benefit of that interest of Whiteside under the commission. And for that doctrine they rely on the case *Ex parte Enderby*,¶ which, they contend, must be taken now to be the law on the subject, and to have settled all

† See note, *supra*.—R. C.

‡ 1 B. & Ad. 398.

§ 11 R. R. 115 (17 Ves. 403).

|| 19 Ves. 455.

¶ 2 B. & C. 389.

the former conflicting cases. To the authority of that case we certainly subscribe. In that case, indeed, the partnership had expired by effluxion of time before the commission issued; in the present case it continues up to the date of the commission; but we cannot think that circumstance makes any difference in principle between the two cases; and in the present instance, if Whiteside had been solvent and able to pay all the creditors of the three, and a commission of bankrupt had issued against the two Starkeys, we do not think that he could have claimed to be entitled to his share of the joint effects any more than Enderby could in his case. It may be argued, however, that the rule of law laid down in that case may well apply against the solvent partner himself, who is in default, by suffering his share to remain in the possession and order of the bankrupt, and who, therefore, is excluded by the policy of the law from claiming any thing to the prejudice of creditors whom he may have been, in part, the means of misleading, but that it forms a very different question whether the same rule should be allowed to hold where the *interest of the creditors of Whiteside is affected by its application, and where, as in the present case, the creditors of the three have trusted the firm when Whiteside's 24,000*l.* formed part of the capital. However, upon the best consideration we can give to the subject, we think the principle of the case *Ex parte Enderby* may and ought to be extended to a case circumstanced like the present.

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The question, then, arises, whether, if the old creditors are entitled to treat this as a case within the seventy-second section of 6 Geo. IV., they may not exclude all other persons, on the ground, that if the funds of Whiteside have, under the circumstances, been placed in the hands of the two Starkeys contrary to the policy of the law, no persons but the old creditors can prove. But we think they are not to have that privilege. In fact, the new creditors have a better right, upon principle, than the old creditors; because the new creditors trusted the firm on the faith of their apparent funds, including Whiteside's capital; whereas the old creditors never did trust them upon the faith of these funds, but only forbore to sue them upon the faith of their apparent stability. And unless there be some principle which

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forbids different classes of creditors claiming upon the same funds, we think both sets of creditors ought to be permitted to prove; that is, the new creditors, on the ground of the funds belonging to persons whom they certainly trusted; and the old creditors, on the ground of the two Starkeys being the apparent owners of the whole. Still further, if the creditors of the old firm claim to exclude the creditors of the new firm, another answer may be given, to which, indeed, we have already referred, viz. that as Whiteside was a secret partner, the creditors of the new firm might have brought actions, or sued out a commission of bankrupt against the two Starkeys, (according to the cases of *De Mautort v. Saunders* and *Executors, Ex parte Hamper*, and *Ex parte *Norfolk*, before referred to), and then, as Whiteside was a dormant partner, and the two Starkeys were the apparent owners, the new creditors might have insisted upon Whiteside's share being distributable under such a commission, and, consequently, would have the same right to insist upon the apparent ownership as the old creditors have. We are therefore of opinion, upon the whole of this case, that both the creditors of the two Starkeys by themselves, and also the creditors of the two Starkeys and Whiteside jointly, should be admitted to prove *pari passu* upon the joint estate of the three. Then, supposing the old creditors are entitled to prove upon the joint estate, it is to be considered whether those who had notice of Whiteside becoming a partner, can be admitted to the benefit of the proof? And upon that point, inasmuch as the proof is upon the ground of apparent ownership in the two Starkeys, we think it can make no legal difference whether the old creditors knew of the change or not, inasmuch as none of the old creditors trusted the firm while Whiteside's property was in it; and, therefore, the knowing or not knowing of the change seems to us to make no difference. We see, therefore, no objection to those particular creditors being allowed to prove, as well as the rest.

MERCANTILE CASES.

NEW *v.* SWAIN.

(Danson & Lloyd, 193—195.)

1828.

K. B.

MICHAELMAS

TERM.

[193]

Where goods have been sold on credit, and the term of credit has expired, the unpaid seller, if still in possession of the goods, may retain possession of them until payment or tender of the price.†

ASSUMPSIT. The plaintiff had bought of the defendant several bags of hops for 1,400*l.*, to be paid by bill of exchange at three months. The bill was given: but the plaintiff having no convenient place for depositing the goods, agreed to leave them with the defendant, who kept a warehouse for the purpose, at a stipulated rent for the warehouse-room. Before the end of the three months the plaintiff sold the hops again to a Mr. Amos; but the bill having been dishonoured when due, the defendant refused to deliver them. The plaintiff then proposed that 700*l.* (half the amount of the bill) should be paid on condition that the defendant would deliver half the bags of hops to Mr. Amos; but this also was refused. Two months afterwards the bill was paid, and the hops thereupon delivered; but a reduction in the price having taken place in the meantime, the plaintiff sustained a loss, for which he brought this action. The declaration contained several special counts: the first set stating with particularity the contract of sale, and deducing from thence the implied undertaking of the defendant to deliver the hops on request, &c.; and the fifth count averring an undertaking to deliver them on payment of the warehouse rent.

At the trial before Lord Tenterden at Guildhall during the sittings after Trinity Term, the plaintiff was nonsuited, on the ground that the seller having possession *of the goods at the time when the bill was dishonoured, had a right thenceforth to retain them until payment of the price: and

[*194]

Sir James Scarlett now moved to set aside the nonsuit and for a new trial, contending that there was in this case an actual

† Sale of Goods Act, 1893, s. 41, sub-s. 1 (b), and Mr. Chalmers's note there, where this case is by some accidental error described as a *Nisi Prius* decision.
—F. P.

NEW
C.
SWAIN.

delivery of the goods to the buyer. By the agreement to receive a rent for the warehouse room, the defendant, he said, admitted that he had no longer the possession in his own right. From that time he held them merely as the warehouseman and agent of the buyer. Then, having once divested himself of the possession, his lien was irrevocably gone. A lien must arise out of something at the time of the contract, and cannot be created by matter *ex post facto*, such as in this case, the non-payment of the bill. The defendant here has waived his lien, and elected to take his remedy on the bill: nor can he be allowed the choice of availing himself of a contract which he has entered into as the consideration for parting with the goods, or of insisting on the right which he might otherwise have had of retaining the possession until payment.

(BAYLEY, J.: It is not properly a lien, but a right growing out of the original ownership, and not destroyed by the loss of possession.)

Undoubtedly, in certain cases, the seller has a right to resume even after he has parted with the possession—he has the right of stoppage *in transitu*; which, though originally an equitable power, has long been recognized at law: but this right is exercised in cases of a general suspension of payment, or known insolvency of the buyer, and is founded rather on a supposed incapacity on his part to receive or administer. Here there is nothing of that kind: besides, even in that case, if the delivery be once complete—if the buyer have gained possession of the goods even constructively, the right of stoppage is gone. Now in

[*195]

Hurry v. Mangles,† *Lord ELLENBOROUGH held, in a case very similar to the present, that the acceptance of warehouse-rent by the seller was a complete transfer of possession to the purchaser.

LORD TENTERDEN, Ch. J.:

We are all of opinion that, on non-payment of the bill, the defendant had a right to retain the goods. The general rule

† 10 R. R. 727 (1 Camp. 432).

is well known, and we do not think that the right was in this case taken away by the agreement for rent.

NEW
v.
SWAIN.

BAYLEY, J. :

Where the owner of goods sells on credit, the buyer has a right to immediate possession : but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with a rent or not. They are still in his possession.

[Some discussion then took place as to the fifth count of the declaration, and the Court ultimately granted a

Rule nisi on that count.]

CASES AT NISI PRIUS.

LOMI v. TUCKER.†

(4 Car. & P. 15—16.)

1829.
July 10.

[15]

A. sold to B. for 95*l.* two pictures, representing them as “a couple of Poussin’s,” they were, in fact, not originals, but very excellent copies; B. did not offer to return them : Held, that if the jury thought that B. believed, from the representation of A., that they were originals, he was not bound to pay the price agreed upon ; but that, as he kept them, he was liable to pay such sum as the jury might consider to be the value.

ASSUMPSIT for the price of various articles of *virtu*, and among them two pictures, charged in the particulars of demand as having been agreed for at 95*l.* The plaintiff was an Italian doctor, and the defendant an attorney. It appeared that the plaintiff had represented the pictures in question as “a couple of Poussin’s.” It was admitted that they were not originals ; but it was contended, on the part of the plaintiff, that the price would shew that they were never intended to be sold as originals, which would be of much higher value, and that they were only sold as very good copies.

Lord TENTERDEN, Ch. J., left the question to the jury, saying : If you think that the defendant bought these pictures, believing,

† Cp. *Power v. Barham* (1836) 4 A. & E. 473, 6 N. & M. 62.

LOMI
v.
TUCKER.

from the plaintiff's representation, that they were original pictures painted by Poussin, then I am of opinion that the defendant is not bound by his bargain.

Gurney, for the plaintiff:

The defendant has not offered to send the pictures back.

[16] LORD TENTERDEN, Ch. J.:

If he had returned them, I should have thought that you could not recover any thing; but as he has not, I think you are entitled to recover whatever the jury may think to be the value.

Some money had been paid into Court, and the jury found a

Verdict for the defendant.

1829.
Oct. 24.

REX v. CLAPHAM.

(4 Car. & P. 29—30.)

[29]

If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth.

INDICTMENT against the defendant, charging that he, with intent to impose on the Court of Examiners of the Apothecaries' Company, and to induce them to examine him for the purpose of his obtaining a certificate to practise as an apothecary, did fraudulently produce a certain instrument in writing, purporting to be an affidavit that he was of the full age of twenty-one years; by means of which he obtained from the Court of Examiners a certificate to practise as an apothecary, whereas, in truth and in fact, he was not then of the full age of twenty-one years, as he then well knew. Plea, not guilty.

It appeared that, previous to his examination at Apothecaries' Hall, in the month of March, 1828, the defendant had left a paper purporting to be an affidavit, that he was of the age of twenty-one years.

To shew that he was not of that age, a witness proved the names of his father and mother, and that they lived at Thorney; and an examined extract of the register of baptisms of the parish

of Thorney was put in: this stated the day on which he was baptized, and also the day on which he was born.

REX
v.
CLAPHAM.

LORD TENTERDEN, Ch. J.:

The part of it respecting the time of his birth must not be read. This entry is no evidence of that, it is only proof of the baptism.

Evidence was given of a declaration made by the defendant, that he was not of the full age of twenty-one when he obtained his certificate; and his counsel then consented to a verdict of

Guilty.

In the ensuing Term the defendant was sentenced to be imprisoned for six calendar months. [30]

PERRING AND ANOTHER v. TUCKER AND ANOTHER.

(4 Car. & P. 70—71; S. C., Moo. & Mal. 391.)

1829.
Oct. 26.

Where two defendants appear, and plead by one attorney, but, at the trial, counsel appear only for one defendant, and the other defendant appears in person, the counsel only will be allowed to address the jury, but the defendant who has no counsel, may cross-examine the witnesses.

[70]

TROVER for a mortgage deed. The defendants were Dr. Tucker and a Mr. Smyrdon, they had appeared and pleaded by one attorney.

At the trial, *Taddy*, Serjt., and *Chitty*, appeared for Smyrdon, and Dr. Tucker appeared to conduct his defence in person.

Upon this being stated to be the case by *Taddy*, Serjt., when he rose to cross-examine the first witness for the plaintiff—

Wilde, Serjt., objected to the arrangement, and the question was then discussed.

Chitty:

A man may appear by attorney, and afterwards defend in person; his means may diminish: and if he were not in such

LEBBING v. TUCKER. case allowed to defend himself, he would not be able to make any defence at all.

TINDAL, Ch. J., inquired if there was any authority on the subject.

Wilde, Serjt., replied in the affirmative.

Taddy, Serjt. :

There is no case where the party himself has required it. The Court may make rules with respect to counsel, who are, in a certain sense, officers of the Court, but a defendant is in a different situation. If there were no counsel and several defendants, all of them would be allowed to speak, although they had appeared by the same attorney.

Dr. Tucker said that his defence was different from that of the other defendant.

[71] *Wilde*, Serjt., referred to the case of *Chippendale v. Mason*.†

TINDAL, Ch. J. :

I can only take it, that the two defendants have thought proper to entrust their defence to one attorney, who has put one defence, joining them, on the record. If he has acted improperly, he will be answerable. I think, that as counsel are engaged for one defendant, the other defendant cannot be heard, and that upon a principle of public policy. Under the circumstances, I do not think it proper that two speeches should be made to the jury. Then, with respect to who is to be preferred, I think I must hear my brother *Taddy*, because he is a Serjeant, and his duty requires him to appear.

The case then proceeded, and Dr. Tucker was not permitted

† 4 Camp. 174. That case decides, that where several defendants appear by separate attorneys, and have separate counsel, if they are in the same interest, only one counsel can be

heard to address the jury, and the witnesses are to be examined by one counsel on the part of all the defendants, in the same manner as if the defence were joint.

to address the jury; but he was allowed to cross-examine the witnesses.

PERRING
v.
TUCKER.

It appeared, in the course of the argument, that application had been made to Mr. Justice PARK, at Chambers, to allow the defendants to sever in pleading, but his Lordship said, that as the only object was to have two speeches, he did not think it proper to grant the application.

NEWELL AND ANOTHER v. JONES.

(4 Car. & P. 124—125; S. C., Moo. & Mal. 449.)

1830.
Jan. 22.

[124]

If a party shew, in an action for money lent, that it was the course of dealing between him and the defendant to calculate the interest every year, and add that to the principal, and the next year to calculate upon the total, he may recover interest, calculated in same way, for the years subsequent to the striking of the last balance between the parties.

ASSUMPSIT for money lent, and upon an account stated.

On the part of the plaintiffs, accounts were put in, shewing, that, from the year 1824 to the year 1827, the plaintiffs and defendant balanced their account of principal and interest every year; and that the interest, at the end of each year, was added to the principal, and at the end of the following year interest was calculated upon the principal and interest of the former year.

Kelly, for the defendant:

The question is, whether the plaintiffs are entitled to more than 5*l.* per cent. interest on the last balance of these accounts?

LORD TENTERDEN, Ch. J.:

Unless you can alter these documents my opinion is formed.

Kelly:

There cannot be interest upon interest without an express agreement; and if there was such an agreement, I submit that it would be illegal, as an agreement for compound interest. I believe that question has been raised in equity, but not decided.

NEWELL,
r.
JONES.

Brodrick, for the plaintiffs, cited Bruce v. Hunter.†

LORD TENTERDEN, Ch. J. :

[*125]

These different accounts shew, that the course of dealing was that interest should be calculated every year, and that that sum should be carried *on to the next year ; I am of opinion that these plaintiffs are entitled to recover. I recollect, in a case before Lord Kenyon, that where interest had been calculated every year, and carried on to the next year, it was held to be evidence to shew a course of dealing.

Verdict for the plaintiffs for the whole sum claimed.

1829.
July 29.

*Berkshire
Assizes.*

[126]

SMITH, ADMINISTRATRIX OF SMITH, GENT., ONE, &C.
v. FORTY.

(4 Car. & P. 126—128.)

An administratrix sued for a debt due to the intestate. It appeared that the debt accrued more than six years before the commencement of the action ; but that, within six years, the defendant and the agent of the administratrix went through the account together, and struck a balance, which the defendant promised to pay as soon as he could : Held, that the administratrix was entitled to recover on a count upon an account stated with her, and that the Statute of Limitations was no bar.

[*127]

ASSUMPSIT, for business done by the intestate, as an attorney. The declaration contained a count upon an account *stated with the administratrix. Pleas : first, general issue ; second, the Statute of Limitations.

All the business had been done more than six years before the commencement of the action, except the writing of a letter, for which 3s. 4d. was charged.

It appeared that Mr. Smith had died in the year 1825 ; and that, in the year 1826, Mr. Moore, who had been his clerk, was employed by the administratrix to get in the debts, and that the

† 3 Camp. 467. In that case, it was held, that an agent who had advanced money for his principal in effecting insurances and other mercantile business, was held to be entitled to charge interest ; and, at

the end of every year, to make a rest, and add the interest then due to the principal, it being shewn that the parties had so calculated interest in previous accounts.

defendant, in consequence, called on him. It further appeared, that the defendant and Mr. Moore went through the account together; and that, after allowing some deductions, which were claimed by the defendant, they struck a balance of 40*l.* 5*s.* 5*d.* in favour of the administratrix. Mr. Moore made a memorandum of this amount on a piece of paper, and the defendant said, "I hope Mrs. Smith will not press me for the money, for I will pay her as soon as I can, with interest."

SMITH
v.
FORTY.

Jervis and *Talfourd*, for the defendant, objected, that this would not take the case out of the Statute of Limitations, since the stat. 9 Geo. IV. c. 14, as there was no promise or acknowledgment in writing.

VAUGHAN, B.:

I think that the plaintiff has shewn a good cause of action on the count upon an account stated with the administratrix. The plaintiff does not go upon the original debt at all. I take the statute 9 Geo. IV. c. 14, to apply to cases where you go for the original debt, and then give some evidence of an acknowledgment to rebut the presumption raised by the Statute of Limitations, that the debt has been satisfied in the course of six years since it occurred.

[*128]

*Verdict for the plaintiff. Damages, 40*l.* 5*s.* 5*d.**

BLEADEN AND ANOTHER v. HANCOCK.

(4 Car. & P. 152—156; S. C., Moo. & Mal. 465.)

Two persons, jointly interested in a chattel, having made a joint demand of it, may, notwithstanding, maintain separate actions of trover in respect of it, against a person who unjustly detains it.

If a party claim a lien on plates for his bill for printing from them, in order to establish it, he must shew a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage.

Semble, that there is no such usage, with respect to stereotype, and *quære* if there be with respect to copper-plate printing.

TROVER, for stereotype and other plates. Plea, not guilty.

The plaintiffs were the assignees of a bankrupt, named Bumpus, who carried on the business of a bookseller and publisher, in

1829.
Dec. 10.

[152]

BLEADEN
r.
HANCOCK.

Skinner Street; and the defendant was a printer, in Holborn, who had been employed to print, from stereotype plates, several popular works, of some of which the bankrupt was the sole proprietor, and in others of which he had a half share, in conjunction with a person named Taylor. The commission against Bumpus was dated the 26th of January, 1826. In the month of November, 1827, the accountant for the assignees tendered to the defendant a sum of 123*l.* to cover some advances in the way of discount, which he had made to the bankrupt, and demanded the plates, on behalf of the assignees. The defendant refused to deliver them up, saying, that he had a lien on them for the balance of his demand for printing. The plates were advertised for sale on the 20th of December. On the morning of that day the accountant of the assignees went to the auctioneer, and told him that the assignees could not allow these plates to be sold, and that he should stay, in order to forbid the sale. Upon which the auctioneer communicated with the defendant, who was at the time in the sale room; and on his return to the accountant, gave him a memorandum, addressed to the assignees, stating, that the plates were about to be sold, not by their "consent or concurrence, but on the contrary." Previously to this, the defendant had sent to the plaintiffs a notice, in the following form:

[*153]

"To John Bleaden, and Henry Thomas Curtis, assignees of the estate and effects of John Bumpus, a bankrupt; and to Benjamin Hanbury, and Henry Thomas Curtis, *assignees of the estate and effects of Charles Taylor, a bankrupt.

"I do hereby give you notice, severally, that I now have in my possession certain stereotype plates, the joint property of the above-named bankrupts; and certain others, the property of the said John Bumpus; which were respectively deposited with me some years ago, for the purpose of printing certain books therefrom for the said bankrupts; and which plates I hold until my accounts for such printing are paid or satisfied. And I do hereby further give you notice, that there is now due to me, in respect thereof, the sum of 420*l.* 10*s.* 6*d.*; and I therefore call upon you forthwith to pay the said sum of 420*l.* 10*s.* 6*d.*, or sell the said

plates, and pay me the proceeds thereof, in liquidation or part liquidation, as the case may be, of my said demand; and in the event of your declining to do so, within fourteen days from the date hereof, I do hereby further give you notice, that I shall thereafter proceed to sell the same plates by public auction, and apply the produce of such sale, after payment of all expenses, in discharge of the said sum of 420*l.* 10*s.* 6*d.*, so due to me as aforesaid, if the same will so far extend; and, if more than sufficient, I shall pay you over the surplus."

BLEADEN
v.
HANCOCK.

The demand made by the accountant of the assignees, on the 24th of November, 1827, was in writing, and in these words:

"We, the undersigned H. T. C. and J. B., the assignees appointed under a commission of bankrupt against John Bumpus; and we, the undersigned B. H. and the said H. T. C., the assignees appointed under a commission of bankrupt against Charles Taylor, do hereby demand the delivery to us, or to our agent, Mr. Andrew Duncan, of &c., for that purpose authorized, certain stereotype plates in your possession, used for the printing of the following works (that is to say), Hume and Smollett's History of England, &c., the joint property of us, as such *assignees as aforesaid; and we, the said H. T. C., and J. B., as such assignees of the said John Bumpus, do hereby also demand the delivery to us, or to the said Mr. A. D., &c. of the stereotype plates used for the printing of the following works [naming them], the property of us, the said H. T. C., and J. B., as such assignees of the said John Bumpus, as aforesaid. Dated this 23rd day of November, 1827."

[*154]

Taddy, Serjt., for the defendant, submitted, that, as to those plates, in which there was a joint property, the action was not maintainable. The demand is made by the assignees of Bumpus, and the assignees of Taylor, and the action is not maintainable, because the property is in an article not in itself divisible. There is a tenancy in common in certain persons, who make a joint demand. Their property is never severed. Parties may sever, and then maintain separate actions; as in the cases of *Sedgworth v. Overend*, 7 T. R. 279, and *Addison v. Overend*, 6 T. R. 766, in

BLEADEN
v.
HANCOCK.

which cases the article was wholly destroyed. But here, instead of severing, they join, and make a joint demand, and they must bring a joint action, and not subject the party to two actions. They cannot, by a joint demand, support a separate action.

TINDAL, Ch. J. :

It appears to me to be the ordinary case. Two persons, interested in a chattel, bring separate actions for a tort. The damages may be severed. They are not so tied together by the joint demand, that they may not sever even when they come into Court.

[*155] *Taddy*, Serjt., then objected, that, with respect to those plates, which had been sold, but were not mentioned in the written demand, there was no evidence of conversion by the defendant; as it had not been shewn either that he ordered the sale, or that he had received the proceeds of it; and, without shewing one of these things, though the *assignees might have their action of trover against the auctioneer for selling, yet they could not maintain it against the defendant.

TINDAL, Ch. J. :

I think it is a question for the jury, whether they will presume an authority from the defendant to the auctioneer, from the circumstance of his having declared an intention to detain the plates, and to sell them by auction, in order to satisfy his claim.

It appeared that the following certificate, indorsed on the printed catalogue, had been signed by the assignees, and sent to the Excise Office, to save the auction duty: "We do hereby certify, that Lots 1 to 1814, 1815 to 1823, 1826, 1830, 1841 to 1516, enumerated in this catalogue, and sold for 1,186*l.* 18*s.*, were the property of John Bumpus, bankrupt, at the time the commission was issued against him, and that the same were sold for the benefit of his creditors. JOHN BLEADEN, and HENRY THOMAS CURTIS, assignees."

Taddy, Serjt., contended that the assignees could not, after

having done this act, say that the sale took place without their assent.

BLEADEN
v.
HANCOCK.

But, upon this point, TINDAL, Ch. J., said that it was a question for the jury, whether, under the Act of Parliament, it was not proper for the assignees to certify that it was a sale of the bankrupt's property, although it was not made for the general benefit, because the payment of the duty would be so much ultimately to be deducted from the amount of the bankrupt's estate.

The substantial defence was a claim of lien upon the plates, for the amount of the bill for printing from them. To establish this, several witnesses were called on the part of the defendant. Some of them were copper-plate, *and others stereotype, printers. They proved various instances, in both trades, in which the claim had been made and acquiesced in. But, for the plaintiffs, in reply, other persons in those trades were called, who stated other cases in which it had been successfully resisted.

[*156]

TINDAL, Ch. J. (in his summing up), said, upon the subject of the lien :

This is not the case of a lien claimed by a person who has bestowed labour, or expended money upon an article, and who may detain it till he is paid. Every body knows that, by the common law, a man may detain the commodity on which he has bestowed labour or money. But this is a claim of a larger lien, and those who seek to establish such a lien must shew a course of dealing so general and uniform, that persons must be supposed to form their contracts tacitly on the understanding that there is such an usage. And it is for you to say, whether, in this case, any such uniform usage has been proved to your satisfaction. You ought to be satisfied that it is established affirmatively before you find in favour of it.

The jury found against the claim of lien, and gave their verdict generally for the plaintiffs for 646l.

1829.
Dec. 12.

THOMPSON *v.* FINDEN.

(4 Car. & P. 158—160.)

[158]

In an action against one of the owners, for work done to a vessel, by the order of the ship's husband, the owner will be liable, unless it be shewn, that the dealing was that the person who directed the work to be done should be looked to exclusively.

ASSUMPSIT for work and labour against the defendant, as one of the owners of several vessels. Plea, general issue.

On the part of the plaintiff, it appeared, that the work was done on the order of a person named Butcher, who was the ship's husband to all the vessels, and a part owner of some of them ; and it appeared, partly from transfers, partly from letters written by the defendant, who was a widow lady residing in the country, and partly from conversations with her, that she had an interest in all the vessels to which the work had been done.

[159]

Jones, Serjt., for the defendant, submitted, that, as the work was done on the order of Butcher, it must be taken, that exclusive credit had been given to him ; and therefore, that the defendant, as an owner, was not liable.

TINDAL, Ch. J. :

I should think an exclusive credit would be a giving up of the owners generally, and the making an exclusive bargain with the person who orders the goods, and an agreement to furnish them on his credit only. But as to some of the vessels, the case does not come within that principle ; and as to them, the question is, whether, if goods are ordered by one joint owner, the party furnishing them may not, if he finds them out, bring an action against the other owners ; and I have no hesitation in saying that he may.

Jones, Serjt. :

My defence is twofold. First, I shall satisfy the jury that the credit was given personally to Butcher ; and, therefore, I shall contend that the owners are discharged ; and, secondly, I shall shew that an action has been brought, and a judgment recovered against the father of Butcher, whose wife was a joint-

owner; and I shall submit, that they cannot, after that, bring a fresh action.

THOMPSON
v.
FINDEN.

TINDAL, Ch. J. :

Do you propose to shew that there was satisfaction as well as a judgment?

Jones, Serjt. :

I submit that it is not necessary, and that they cannot bring a fresh action after judgment recovered, as there might be a plea in abatement.

Notice had been given to produce the plaintiff's books. The day-book and the ledger were not produced, but the ledger was offered, and not accepted.

Jones, Serjt., then called the plaintiff's attorney, and *asked him whether he was attorney in an action brought against Butcher, senior, by the plaintiff in the present action. He replied that he was; and admitted that he had received a notice from the defendant's attorney to produce the papers, and the judgment in the cause.

[*160]

Bompas, Serjt., objected to this evidence; and TINDAL, Ch. J., said, the judgment is not in the custody of the defendant. You should have taken out a summons to get the record made up, and have taken an examined copy of it.

TINDAL, Ch. J., in his summing up, said :

We must not try this cause as a matter of feeling, but according to the rules of law. Suppose the books of the plaintiff had been produced, and the name of Butcher only found there, that would not make any difference. The question is, whether Mrs. Finden was not a joint-owner; and, on the evidence, there can be no doubt that she was. She may sue for contribution from the other joint-owners. Unless the defendant could shew that the dealing was that Butcher should be looked to exclusively, the verdict must be for the plaintiff.

Verdict for the plaintiff.

1829.
Dec. 14.

MASSEY v. GOYDER AND OTHERS.†

(4 Car. & P. 161—166.)

[161]

Where notice was given to the occupier of adjoining premises of an intention to pull down and remove the foundations of a building, on part of the footing of one of the walls of which one of the walls of the adjoining premises rested : It was held, that the party giving the notice was only bound to use reasonable and ordinary care in the work, and was not bound in any other way to secure the adjoining premises from injury, although, from the peculiar nature of the soil, he was compelled to lay the foundation of his new building several feet deeper than that of the old.

THE first count of the declaration stated that the plaintiff was lawfully possessed of a certain messuage or dwelling-house and premises, and that the defendants had pulled down, and caused to be pulled down, a certain chapel or building contiguous to, and next adjoining the said messuage or dwelling-house ; and that they wrongfully and injuriously sunk, dug, and made, and caused to be sunk, dug, and made the foundation on which the walls of the said chapel or building had before then stood, much lower and deeper than it had theretofore been, and also much lower and deeper than the foundation of the said messuage or dwelling-house ; and also set up, erected, and built, and caused to be set up, erected, and built thereon, divers walls, and a certain other chapel or building of great weight, without previously giving to the said plaintiff due and proper notice of such digging and deepening the said foundation, and of setting up, erecting, and building, the said walls thereon ; so that the said plaintiff might have had the opportunity of taking and using such precautionary and reasonable measures as might have been deemed necessary for the safety and preservation of his said messuage or dwelling, and the foundation thereof, and for the prevention of any injury or damage thereto ; and that they, the said defendants, kept and continued such walls, and the said chapel or buildings so erected, raised, and built, for a long time ; by means of which several premises, and for want of due and proper notice of the digging and deepening of such foundation, the said messuage or dwelling-house of the said plaintiff, and the

† But, as to the effect of 20 years *Angus* (H. L. 1879) 6 App. Cas. 740, enjoyment of support, see *Dalton v.* 50 L. J. Q. B. 689.—R. C.

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walls and foundation, became and were greatly disturbed and unsettled, and greatly cracked, broken, damaged, and spoiled, and the said messuage or dwelling-house was rendered wholly uninhabitable, and of little or no value to the plaintiff, &c.

The second count was similar to the first, except that, *instead of stating that the defendants erected and built "certain walls, and a certain other building or chapel," it merely stated that they erected "a certain wall."

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The third count only complained of the deepening of the foundation, and omitted the part relating to the erection.

The fourth count, after stating that the defendants had deepened the foundation, and had erected divers walls upon it, went on to aver, that they so carelessly, negligently, and improperly, behaved and conducted themselves in and about the digging and deepening the said foundation, and in setting up, erecting, and making the said walls on such foundation, that, by and through the mere carelessness, negligence, and improper conduct of the said defendants, and their servants and workmen, the messuage or dwelling-house of the plaintiff, and the walls and foundation thereof became and were greatly disturbed, shaken, and unsettled, &c., and greatly cracked, &c., whereby the house was rendered uninhabitable, and the plaintiff lost divers gains and profits, which would otherwise have accrued to him from the possession, occupation, use, and enjoyment thereof. The defendants pleaded, not guilty.†

The plaintiff was a cabinet-maker, and was the lessee of a house in the Waterloo Road, adjoining to a building called the New Jerusalem Church, of which the defendant Browne was the builder, and the other defendants *were trustees and committee-

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† The defendant Browne pleaded by a different attorney from the other defendants; and his counsel addressed the jury for him. Where several defendants plead separately, but by one attorney, it is doubtful whether, if they employ separate counsel, those counsel will each have the right to address the jury. Mr. Justice PARK, in the Common Pleas, has intimated, that he would not permit it to be done. In a late case in the Court of

King's Bench, in which *Mr. Gurney* and *Mr. White* were for one defendant, and *Mr. Denman* for another, *Mr. Gurney* and *Mr. Denman* both addressed the jury, without any objection being made on the part of the counsel for the plaintiff. See, as to this point, the cases of *Batty v. M'Cundie*, 3 Car. & P. 204, n. (a); *Doe v. Tindale*, 3 Car. & P. 565; *Perring v. Tucker*, ante, p. 772; and the case there cited.

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men. A chapel stood formerly on the same ground, and it appeared that the wall of the plaintiff's house, which was erected some considerable time after that chapel, rested partly on the projecting footing of one of its walls. And the plaintiff complained, that, when that chapel was taken down, and the space for the foundation of the new one dug, which foundation was lower than the old one, and, of course, also lower than that of the plaintiff's house, the soil, which was of a soft alluvial nature, escaped from under that part of his wall which was exposed, and caused a settlement of the wall, which produced cracks in the house, and did other injuries to the premises, which were estimated at 250*l*. The plaintiff denied that any notice had been given of the intention to pull down the chapel. There was no under-pinning of the plaintiff's wall, and his witnesses said, that, if there had been, the injury complained of would not have happened. The digging for the foundation only proceeded for the space of five or six feet at a time, and that space was filled with concrete, which was suffered to become hard before any further digging took place.

On the part of the defendants it was proved, that, for several months prior to the month of June, 1828, a hoard had been erected in front of the old chapel, and that printed bills were stuck upon it, notifying that the society would "meet for public worship at the Rev. Mr. Sibley's chapel, in Friar's Street, Doctors' Commons, during the rebuilding of the new church:" and that, in addition to this, the foreman to the defendant Browne inquired of a person named Day, who was lodging in the plaintiff's house, for the address of the owner; and being told that it was Mrs. Tyler, of Leicester Square, caused the following notice to be served upon her:

"LONDON, 3rd July, 1828.

"MADAM,—In consequence of taking down the building, known as the New Jerusalem Church, in the Waterloo-bridge Road, adjoining your premises, I am directed to *write to request you to attend or appoint some person on your part, to meet me on the premises to-morrow, at eleven o'clock, to determine what is necessary to be done in shoring up your premises prior to

removing the foundation of the old church.—I am, &c., for
J. Browne,

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“H. LORDEN.”

“To Mrs. Tyler, 49, Leicester Square.”

The next morning Mrs. Tyler, accompanied by Day, the lodger, came to the foreman, and it was arranged that shores should be put up on the outside of the wall of the plaintiff's house. The plaintiff lived in the house in Leicester Square to which the notice was sent, and several times spoke of his having received it. The plaintiff refused to allow the builder's foreman to shore up the wall on the inside. It was doubtful whether a considerable part of the injury to the plaintiff's house had not resulted from a settlement of the old chapel.

On the part of the defendants, the giving of notice was relied on as an answer to the action; and it was further contended that, as the plaintiff's wall rested on the footing of that of the old chapel, the defendants, having occasion to pull down that chapel, were not answerable for any damage sustained by the plaintiff, because it arose from his own act in so erecting his wall, and not from any improper conduct upon their part. Allusion was made to the case of *Peyton v. St. Thomas's Hospital*.†

Spankie, Serjt., for the plaintiff:

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In the civil law it is laid down, that a man has no right to make a new erection without giving notice of his intention; and the Prætor, according to that law, might compel him to give security, to prevent any injury to the adjoining premises; and by the law of England such notice is necessary. In this case, the right to build a chapel was subordinate to the right the plaintiff had of having his house uninjured. It was the duty of the defendants so to build their wall as not to shake the foundation of the adjoining house. The case of *Peyton v. St. Thomas's Hospital* differs from the present, as that was a case merely of pulling down a house, and there was no question about altering the foundations, or digging new ones. There was nothing to vary the mode in which both the parties had used and enjoyed

† 33 B. R. 311 (9 B. & C. 725).

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their respective houses. But it has never yet been decided, that a party who is going to do something new is not bound to give notice of his intention to the occupier of the adjoining premises. It seems there was a raking shore, but that was of no use. The injury arose from taking away the foundation by digging deep, and the only operation which could have enabled the plaintiff's house to stand would have been that of under-pinning its wall. The foundation of the plaintiff's house having been in part supported by the footing of the old chapel wall, we contend, first, that the defendants were bound to protect their neighbour, whom they were putting in danger; and, secondly, that whether they were or not, at least they ought to have given distinct notice of their intention, not only to pull down the old building, but to dig their new foundations three feet deeper than the old ones.

TINDAL, Ch. J., left three questions to the jury :

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First, whether the injury to the plaintiff's house was, in fact, imputable to the alteration of the chapel; secondly, whether any notice was given to the plaintiff, calling his attention *to what was about to be done; and, thirdly, (supposing they should answer both these questions in the affirmative), whether the defendants had used reasonable and ordinary care in the doing of the work; for, if they had used such care, having given notice to the plaintiff, they would not, in point of law, be answerable for the injury sustained.

The jury found that the plaintiff had notice, but gave their verdict for him, with 40s. damages. This verdict was eventually entered on the last count in the declaration only.

ANDERDON *v.* BURROWS, M.D., AND TWO OTHERS.†

(4 Car. & P. 210—214.)

1890.
April 26,

[210]

A medical man is not warranted, merely on statements made by the relations of a person supposed to be insane, in sending men to take him into custody and confine him, unless he is satisfied, from those statements, that such a step is necessary, to prevent some immediate injury from being done by the individual, either to himself or to other persons; and, if access cannot be had for the purpose of examination, application should be made to the Lord Chancellor, that the party may be taken up under his authority.

TRESPASS for assaulting and imprisoning the plaintiff, and forcing him to go along certain public streets. Plea, not guilty.

The plaintiff was a gentleman of property, but of very parsimonious and eccentric habits, who resided in a small house in York Street, Lambeth. The first defendant was the eminent physician, well known in that part of the medical profession whose practice is confined to cases of insanity: and the facts, as far as related to the assault and imprisonment, were as follows: About six o'clock in the evening of the 1st of November, 1829, two men, (who were *the defendants Haggard and Shirreff), went to the plaintiff's house, and having induced him to come out, laid hold of him, and told him that he must go with them. He refused to go, and called to some of his neighbours who were passing to come to his assistance. They did so, and questioned the men as to their authority. They said they had authority, and produced a paper purporting to be signed by Dr. Burrows, which paper was in the following form:

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“By order of Mr. Oliver and Mr. James Anderdon, I authorize the bearer to take charge of Mr. Freeman Anderdon, and confine him to his own house, No. 4, York Street, Lambeth, he being insane.”

The bystanders remonstrated with the men, who said they did not want to use the plaintiff ill, but would take him and use him

† It will be observed that this case relates to the powers of detention of a lunatic at common law, apart from the statutory powers now consolidated in the Lunacy Acts, 1890, 1891. But the observations of Lord TENTERDEN

would apply equally to proceedings purporting to be taken under the Acts. See in particular ss. 4, 330 of the Act of 1890 (53 Vict. c. 5), and s. 26 (2) of the Act of 1891 (54 & 55 Vict. c. 65).—R. C.

ANDERDON as a gentleman,—they would take him either to his own house
r.
BURROWS, or to an hotel. He refused to go any where with them, and resisted their attempts to move him. Upon which, one of them who carried a bag, told him that if he was not quiet, they had implements in that bag which would make him so. He got away, by a violent effort, from the man with the bag, and the watch coming up, all the parties went before the constable; and the matter, being investigated, ended in the plaintiff's being set at liberty, and the two men committed to the watch-house, to be taken before the magistrate next day. The bag was examined by the constable, and found to contain screws, straps, a strait-waistcoat, &c. On the investigation next day, at Union Hall, Dr. Burrows admitted that the men had acted by his authority, and that he had never seen the plaintiff; and in answer to a question by Mr. Chambers, he said that it was usual to act if the friends applied, without having seen the person.

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Scarlett, A.-G., in stating the case of the plaintiff said, that although the assault and imprisonment were clearly illegal, and there must be a verdict at all events for the *plaintiff, yet he would not contend that, if a man be really insane, his friends, who interfere for his protection, should be made to pay heavy damages; and, therefore, if it should appear, upon the examination of the witnesses, that the plaintiff was really insane, he would admit that it would go very greatly to mitigate the damages. He was therefore prepared, on the part of the plaintiff, to go at once into the question of sanity or insanity.

Various witnesses were then examined on the part of the plaintiff, among them his landlord, and many of his neighbours, carrying on different trades, who all described him as a person of very good understanding, capable of conversing sensibly upon different topics, and shrewd in making bargains and purchases. From their cross-examination on the part of the defendants, it appeared that the plaintiff was a person of rather peculiar habits; that he kept no servant in his house, that he bought his own food, carried his pie to the baker's, went with his beard of a week's growth, dug large holes in his front garden, went often

without a neckcloth, and wore a large flapping straw hat in the month of November. It appeared also, that he had purchased pictures to the amount of nearly 4,000*l.*, and it seemed that some large purchases made just before, gave the alarm to his friends, and induced them to make the application which ended in his arrest. The pictures, however, were proved, at the trial, to be worth more than he had given for them.

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BURROWS.

Denman, for the defendants, in his address to the jury, contended that Dr. Burrows had acted for the best, and with perfect good faith in the matter :

I allow that the verdict must pass for the plaintiff. I have only to make out that Dr. Burrows acted from honourable motives as a medical man ought, and then the very smallest damages will be sufficient. The only issue between us is, whether the damages ought to be trifling or considerable? It will *be sufficient for me to shew that there was such a *prima facie* case, as to make that inquiry and examination proper, for which alone the steps taken were resorted to. Some course of a preliminary nature must be adopted, and if a respectable family make the representation, what is a medical man to do. I submit that there was such a case of suspicion, as made it perfectly proper and unavoidable to do what Dr. Burrows has done. It seems, that for several years this plaintiff has been in the habit of conducting himself in a most extraordinary way. The absence of intercourse with his family is in itself a very strong circumstance. But in addition to this, there is the evidence of his manner of living. His house, his habits, his dress, his companions, all were totally unworthy of his education and rank in society. From his retired habits, there was no other mode which Dr. Burrows could adopt. There never was any intention of taking him to a mad-house. The intention only was, to put him under the care of his parent and family, in order that Dr. Burrows might have an opportunity of examining him. On the whole it appears that there was a clear case of suspicion, rendering it advisable for the family to make inquiries, and, in order to do that, to employ the defendant, Dr. Burrows.

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ANDERDON LORD TENTERDEN, Ch. J. (in summing up) said :

^{r.}
BURROWS.

It is admitted on both sides that your verdict must be for the plaintiff, and the only question is, as to the amount of damages which you are to give; and with respect to this point, it is material to consider that the plaintiff was taken on suspicion of his being insane. Certainly the course taken by Dr. Burrows has been such as cannot by law be justified. He ought not to have sent two men with such instruments as these appear to have been sent with, merely upon statements made by relations, unless those statements were such as to satisfy him that those steps were necessary to prevent the party from doing some immediate injury either to himself or others. From the statement made

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*by Dr. Burrows, when the parties were before the magistrate, it seems that it is usual, on the application of the family, to act in this manner. I confess I am sorry to hear it so said, for it certainly is not right; and although there may be difficulty in getting access to a party labouring under insanity; yet, the proper course is, if access cannot be obtained, to apply to the high authority, which has cognizance over such matters, to get the party taken up in order that he may be examined. The question for your consideration, under all the circumstances, will be, whether there was reasonable and probable cause for the plaintiff's brothers to consider him as insane, and whether, in consequence of their so considering him, they made the application to Dr. Burrows: for if such should be your opinion, probably you will not go very high in your estimate of the damages.

Verdict for the plaintiff. Damages, 500l.

1830.
Mar. 27.

REES ON THE DEMISE OF MEARS *v.* PERROT.

(4 Car. & P. 230—231.)

[230]

A tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession: Held, that the landlord might recover in ejectment, unless it were shewn that some other person, and not the widow, was the executor or administrator of the tenant, and that it was not incumbent on the landlord to shew that the widow was either executrix or administratrix.

EJECTMENT to recover the possession of a farm, situate at Llanstephan, in the county of Carmarthen.

The farm in question had been let by the lessor of the plaintiff to a person named Davies, who had held it as tenant from year to year; and it was proved, that, Davies being dead, a notice to quit was served on his widow, who remained in possession after his death.

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E. V. Williams, for the defendant:

I submit that the plaintiff must be nonsuited. In the case of *Doe dem. Shore v. Porter*,† it was held that if a tenant from year to year die, his interest passes to his personal representative. Now, here it is not shewn that the person on whom this notice was served was the personal representative of *Davies; which I contend it must be, before the lessor of the plaintiff can be entitled to recover.

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LITTLEDALE, J.:

If you shew on the part of the defendant, that Davies made any will, or that any administration has been granted, you will raise that point. A personal representative can only be constituted either by a will or by letters of administration; and without its being proved that there is either the one or the other, you only shew a possibility of there being a personal representative. I think the lessor of the plaintiff is entitled to recover.

Verdict for the plaintiff.

FORDE v. SKINNER AND OTHERS.

(4 Car. & P. 239—240.)

1830.
Mar. 26.

[239]

If parish officers cut off the hair of a pauper in the poor-house, by force, and against the will of the pauper, this is an assault; and if it be done as matter of degradation, and not with a view to cleanliness, that will be an aggravation, and go to increase the damages.

FALSE imprisonment, with a count for a common assault.
Plea, general issue.

The defendants were the parish officers of the parish of Ninfield, in Sussex; and the plaintiff was a young woman, who was a pauper

† 1 R. R. 626 (3 T. R. 13).

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in the poor-house there. The false imprisonment was not proved ; and the assault complained of was, that, on the 10th of December, 1829, the defendants sent for the plaintiff into a room in the poor-house, and by force, and against her consent, cut off her hair ; and it appeared, that in the struggle, occasioned by her resisting, one of her arms was bruised. It was shewn that the plaintiff wore long hair, and kept it in a clean and neat state ; and there was also evidence given that when the plaintiff had, shortly before, gone with two of the defendants before the magistrates at Battle, one of the defendants said, alluding to the plaintiff and her sister, who was also in the poor-house, that he would soon do something "to take their pride down." It also appeared, that the sister's hair was cut off in a similar way.

BAYLEY, J., (in summing up) :

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However desirable such a regulation as that of cutting off the hair of persons in a poor-house may be with regard to health and cleanliness, *yet it is altogether unauthorized by law, and is a wrongful act, if done without the consent of the party. If, in this case, it was done violently and with force, and with the malicious intent imputed, namely, of "taking down their pride," and not with a view to cleanliness, that will be an aggravation, and ought to increase the damages. You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages.

Verdict for the plaintiff. Damages 60l.

DANIELS v. POTTER AND OTHERS.†

(4 Car. & P. 262—267; S. C., Moo. & Mal. 501.)

1880.
Feb. 22.

[262]

A tradesman, who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured, as that, under ordinary circumstances, it shall not fall down; but if the tradesman has so placed and secured it, and a wrong-doer throws it over, the tradesman will not be liable in damages for any injury occasioned by it.

In an action for an injury to the person, occasioned by the negligent and careless placing of such flap, the declaration of one defendant, who has suffered judgment by default, cannot be used as evidence against the other defendants.

THE declaration stated, in substance, that, at the time of the grievance complained of, the defendants were in the act of putting a hogshead of wine into a cellar in the public street, and that the flap of the cellar was so negligently *placed, that it fell upon the plaintiff, and injured his leg.

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The defendants, Potter, Wing, and Ashley, pleaded the general issue; the defendant Fitzwater suffered judgment by default.

It appeared from the evidence on the part of the plaintiff, that the defendant Potter (who was dead at the time of the trial), was a tobacconist and wine merchant, carrying on business in High Street, Aldgate; that between four and five o'clock in the afternoon of the 20th of February, 1829, the plaintiff, who was a boy of about eleven years of age, was returning with his brother, a year or two older than himself, from the Minories, where they had been sent on an errand; and that they were waiting near Mr. Potter's premises, for an opportunity of crossing over to go to Duke's Place, where they lived, when the flap of a cellar under Mr. Potter's warehouse, (into which the other three defendants, two of them being wine coopers, and one a porter, were letting down a hogshead of wine), fell upon him, and broke one of his legs. The flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement. It was not fastened in any way, but leaned partly against the window of Mr. Potter's warehouse, and partly against that of his next door

† Cp. *Hughes v. Macfie* (1863) 2 276, 46 L. J. Q. B. 436; *Clark v. H. & C.* 744, 33 L. J. Ex. 177. For later cases on a similar point, see *Chambers* (1878) 3 Q. B. D. 327, 47 L. J. Q. B. 427.—R. C.
Whiteley v. Pepper (1877) 2 Q. B. D.

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neighbour. One of the plaintiff's witnesses said, that it was placed in such a manner, that the passing of a stage coach or a heavy waggon might have the effect of shaking it down.

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Taddy, Serjt., in the course of the plaintiff's case, mentioned that he should give in evidence a statement made by the defendant Fitzwater, who had suffered judgment by default, and added, that he proposed to use it, not only as evidence against him, but also against the other defendants. He referred to Phillipps on Evidence, Vol. 1, p. 94, where the case of *Rex v. Hardwick* is cited, and stated to have laid down, that although an admission by one of several defendants in trespass will not establish the others to be *co-trespassers; yet if that is proved by other competent evidence, the declaration of the one, as to the motives and circumstances of the trespass, will be evidence against all who are proved to have combined together for the common object.

TINDAL, Ch. J. :

It seems to me that the words used have reference to a case in the nature of conspiracy.

Taddy, Serjt. :

In every action of tort, if there is evidence of a joint act of trespass, the admission of one defendant seems, according to the case of *Rex v. Hardwick*, to be admissible against all. The plaintiff could not call the defendant as a witness, because his interest is such, that his declarations are evidence without; and a party cannot be placed in such a situation, as that his statements of the facts are not to be used in any way.

Wilde, Serjt. :

In the same page of Phillipps on Evidence it is said, after mention of *Rex v. Hardwick*, "Perhaps, on consideration, it may appear that the rule is to be understood with some limitation; and, from analogy to the principle established by the greatest authorities in cases of conspiracy, the true limitation of the rule appears to be this, that such declarations only are admissible, as have been made with reference to the concerted

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plan, and in pursuance of the common object ; and that declarations, which have not been made with reference to that object, and are not strictly a part of the transaction in question, cannot be admitted as evidence against co-trespassers."

TINDAL, Ch. J. :

The statement is no doubt evidence, for one purpose, against the person himself, because the jury have to say what damage has been sustained ; but the plaintiff wishes to go farther. It seems to me, the authority relied on, on both sides, applies to a case where there is a common object to be furthered ; but here there was no common *object, it is mere negligence. The evidence is certainly admissible, and you will hear how I shall leave it to the jury. I think you will find that which I have stated to be the legitimate distinction. You must make the parties joint agents for one common object, before you can make the declarations of one, who has suffered judgment by default, evidence against the others.

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The declaration of Fitzwater, which was taken down in writing, was then read ; it contained, among other things, an admission, that there was room enough in the shop to have put the flap within it ; that no boys were playing with it ; that coaches and carts were passing at the time it fell ; and that several persons were waiting to cross over.

Wilde, Serjt., for the defendant :

The question is, whether the two defendants, Wing and Ashley, have been guilty of negligence. The declaration avers, that it was the duty of the defendants so to place the flap as not to injure any of the King's subjects passing along the highway ; and that they, not regarding their duty, so negligently, carelessly, and improperly placed it, that, by reason of their negligence, it fell upon the plaintiff and injured him. Persons who have to receive large goods, cannot carry on their business in London, without some partial inconvenience to the public. But the question here is, not as to such inconvenience, but whether, in this particular case, there has been negligence in the using a

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particular thing. I submit that the defendants were only bound to use reasonable care ; and if I shew that boys were playing with the flap, and were told not to touch it, but continued to do so, that will discharge the defendants from the imputation of negligence.

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Witnesses were then called on the part of the defendant ; and, according to their statements, the flap was pulled over by some boys who were playing about, and who were warned by the men in the shop, but would not go away. *It also appeared that the flap had been placed in the same way for many years, and that no accident had happened before.

Taddy, Serjt., in reply :

The question is, whether the flap was placed in a secure position ; if it was, considering its weight, could a little boy have pulled it over ? The defendants are responsible to the public, if they did not place the flap in a secure position. It may have been placed securely on every previous occasion ; but if it was not so on this, the plaintiff must have a verdict.

TINDAL, Ch. J. (in summing up), said :

The defendants were bound, in placing the flap, to use such precaution as would preserve it, under all ordinary circumstances, from falling down ; but if it was so secured, and a third person, over whom they had no control, came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the negligence of the defendants ; the defendant's case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff : and your verdict will be for the plaintiff or defendants, according as you believe the one or the other of these stories. There is no doubt as to the law of the case. The defendant Potter had, it seems, been in the habit of using the cellar for several years, and the limited right to use it for the purposes of trade cannot come in question. But though this be the case, yet the party using it is bound to take such reasonable care in the fixing up and securing the flap, that, in the ordinary course of things, no injury shall happen to any of

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the public passing by. The question for your consideration will be, whether, upon this occasion, the two servants of Mr. Potter, Wing and Ashley, who are the only persons now to be affected, (as Mr. Potter is dead, and Fitzwater has suffered judgment by default), did use due and ordinary care in placing up this flap, so as to prevent any accident from happening. It *might certainly have been secured by a string, or by a hook, or by some person holding it, if that were necessary to the security of it. A tradesman, under such circumstances, is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man, looking at it, would say was sufficient; and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action; but the party must look for compensation to such wrong-doer who so displaced it. With respect to the admission made by Fitzwater, I do not think you are at liberty to make use of it as against the other defendants.

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Verdict for the plaintiff—25l.

SOMES v. SUGRUE.

(4 Car. & P. 276—284.)

1830.
April 20.

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The captain of an insured ship, which has been injured by perils of the seas, is not justified in selling the ship instead of repairing it, unless he either has not the means of getting the repairs done at the place where the vessel is obliged to put in; or cannot get them done, except at such an expense as would render it undoubtedly improper to repair, if the ship were not insured; or has not money in his possession, sufficient to pay for the repairs, nor is in a situation to raise it by loan or otherwise, except at such an extravagant rate as would prevent a prudent man, in the exercise of a sound and vigorous judgment, from undertaking the repairs under such circumstances.

Action on a policy of insurance for 3,000*l.*, on the ship *Sir Godfrey Webster*, valued, with her stores, at 6,000*l.*

A sum of money had been paid into Court.

The plaintiff was the owner of the vessel in question, and the defendant was one of the members of the Saint Patrick's Assurance Company.

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v.
SUGRUE.

On the part of the plaintiff, the mate was first called, from whose evidence in chief the following facts appeared: The *Sir Godfrey Webster* sailed from the cove of Cork, in June, 1825, on a voyage to New South Wales, with convicts. Her course, after delivering the convicts, was for Sincapore, thence to Penang, and thence to London. She had bad weather after she left the Cape. She arrived at Sidney in the month of January, 1826. Having suffered from the weather, she was surveyed at Sidney by three respectable persons, and the quarter galleries were taken away, and the quarters new planked, and there was some fresh caulking. When she left Sidney for Sincapore (where she arrived in May, 1826, after a fine passage), she was quite seaworthy. At Sincapore she was surveyed again by the agent for the charterers, and she was there caulked in the gun-deck. She took in part of her cargo at Sincapore, consisting of sugar, coffee, antimony, &c., and the remainder she took in at Penang. Her cargo was well stowed, and she was not very deep in the water. After she left Penang, about the end of June, 1826, she encountered heavy squalls, of five or six hours' duration, with a confused sea, and she laboured and strained a great deal. This weather lasted nearly the whole of July, and, towards the middle of August, heavy gales came on. She then made water, commencing with about four or five *inches per hour, and increasing as high as fourteen inches. On the 14th or 15th of August, a consultation was had between the captain, the mate, the second officer, and the carpenter, and it was resolved that it would be dangerous to pass the Isle of France, and therefore that it would be best to bear up there; the ship was then very weak and worked much, the top apparently moved from side to side. At Port Lewis, a person named Alexander Asher, was employed as agent for the ship, and on the 21st of August a survey was made by Ambrose, a surveyor, Royer, the harbour-master there, and Hutchinson, the captain of a merchant ship. The vessel was then in a very awkward state outside; several butts had started at the main chains, and some planks had started off, and the larboard side of the main chains had the appearance of being logged; several of the seams were open, and the oakum was nearly all washed out. In consequence of this, about eight or nine days after, part

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of the cargo was taken out, and a fresh survey was made of the inside. Between the surveys the captain died, and the command devolved upon the mate. Upon this second survey, it was discovered that several of the iron standards of the gun and orlop decks had started, and some of the beams of the gun-deck were broken, and the deck itself had partially sunk about the main hatchway, and also that several of the ship's knees were broken. A third survey was thought necessary, and Captain Hutchinson having left the harbour, a Mr. Brooks, the master of a brig, surveyed in his stead. Upon this third survey, which took place on the 7th of September, the remainder of the cargo was taken out, and it was found that about a third of the whole number of knees had been broken. There was an establishment on the island for the repair of vessels, which was called Piston's Establishment, the manager of which came on board after this survey; he estimated the expense of the necessary repairs at 16,000 dollars, (about 4,000*l.* sterling): the *mate asked whether the proprietors of that establishment would enter into a written agreement to do the repairs mentioned in the estimates for the sum of 4,000*l.*, and the answer was, that they would not; because they feared, that when they began to strip the vessel, they should find more defects than they actually saw then. He afterwards asked them to fix a further sum, which they declined doing. The wages of shipwrights were from three to four and a half dollars per day. On the 10th of September, a person named Warwick, a ship-builder, surveyed the ship, and his opinion was, that she was very much injured, apparently by straining, and that, from her general appearance, she would require repairs far exceeding her value. The mate said, that he required a written agreement, because he understood that they would otherwise run him up to an enormous sum, as every thing was very high; that he was willing to sanction 4,000*l.*, but thought it would amount to 8,000*l.* or 9,000*l.*; that Captain Hutchinson and Asher advised him not to repair without a written agreement, in consequence of the high charges, saying, that if he got the ship safe home, she would not fetch as much as the amount of the repairs; that Mr. Warwick also advised him to abandon the ship, which he did very soon after his

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survey; that he had no motive but the good of all concerned, and did not know at the time whether she was insured or not.

On his cross-examination, the mate admitted that the register tonnage of the ship was between 500 and 600 tons; that, before he applied to Warwick, he had applied to a person named Courreaux, who was the person that afterwards bought the ship; that he had never been at the Mauritius before; that he had, after the 14th of August, made several additions to previous entries in the log, as to the state of the weather, &c., and that when he saw the ship after she had been partly broken up, "the timbers were very good," although the ship generally was "in a deplorable state."

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Captain Hutchinson was also called on the part of the plaintiff, and he stated, that he believed that the rate of borrowing on bottomry, at the Mauritius, was 16*l.* or 17*l.* per cent.; that the rate of repairing there was most extravagant; and that he thought it was better to sell the ship than to repair her there.†

The extravagant rate of charge for repairs was also proved by a Captain Weller; who stated that the masts, which here would have cost about 600*l.*, could not have been obtained there for less than 1,600*l.*

In addition to this evidence, Mr. Hillman, the surveyor to the East India Company; Captain Hurd; Mr. Pitcher, a shipbuilder at Blackwall; and Sir Robert Seppings, surveyor to his Majesty's Navy, were called as witnesses; and from their evidence it appeared, that in their opinion it was not advisable to repair the ship, considering the nature of the damage done, and the expense of repairing at the Mauritius, and the high rate at which money was to be obtained on bottomry. One of them said that in his opinion it would have been madness to have repaired. They also thought, that heaving down would be

† Captain Hutchinson, in the course of his cross-examination, gave some extraordinary evidence. He said, that at the Mauritius he had seen from the shore vessels at sea when they were 300 miles distant; that he saw the vessel in question three days before she arrived, and described the

appearance of her sails; he added, that he believed vessels had been seen twelve days before they came in, but he could not give any reason for it. It was suggested, that it might arise from the very great refractive power of the atmosphere in those parts.

necessary to render the ship sea-worthy; and this, it was stated, could not be done at the Mauritius, because there was not any dry dock there. The expense of heaving down was not included in any of the surveys.

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Wilde, Serjt., for the defendant:

The question is, whether this is a total loss or not. The ship is insured in 8,000*l.* by this policy; in 8,000*l.* by another policy; and in 5,000*l.* on the freight. It must be taken to be of the value *of 6,000*l.*, because it is so stated in the policy; and if it could have been repaired at the Mauritius at an expense of 4,500*l.*, or thereabouts, it ought to have been, and then it would have earned its freight of 5,000*l.*, which, added to its value, would have made 11,000*l.* I submit that nothing will justify a sale, but a case of necessity. In *Idle v. The Royal Exchange Assurance Company*,† it was decided that a sale was justifiable, because it was prudent to sell, and would have been imprudent to repair; but, on a writ of error, that decision was reversed, on the ground that to justify a sale it must be shewn that it was necessary to sell. It appears, from the admission of the mate, that when the ship was broken up, the timbers were found to be sound. The supposition, that more would be found requisite, on opening the ship, than the surveys provided for, is not a sufficient ground of abandonment. If it were so, there is no ship that might not be abandoned. Every average loss may be turned into a total loss, if we are not to act upon the surveys of honest men, selected at the time by the captain, but upon the impressions of witnesses at the trial. Although the mate did act for the best, and honestly, yet, if you think that there was no necessity for selling, the defendant will be entitled to your verdict. The plaintiff cannot make out, that if the vessel had not been insured, the owner could have shewn that it was for his interest to sell; and he has no right to do otherwise because he is insured, than he would have done if he had not been.

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On the part of the defendant, the examination on interrogatories of Ambrose and Royer, two of the persons employed to make the

† 21 R. R. 538 (8 Taunt. 755, 3 Moore, 115).

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surveys, were read, as also those of Bassett, the manager of Piston's Establishment, Courreaux, the person who bought the vessel, Biggerand, also of Piston's Establishment, and Tate, the carpenter of the vessel. They differed in their notions of the sum that *would have been necessary to make the vessel sea-worthy, but thought she might have been made fit to bring her cargo to England, and that the repairs mentioned in the surveys would have been sufficient for that purpose. Bassett estimated the expense at 16,000 dollars, Royer at about 20,000. Biggerand thought that 16,000 dollars would have done, allowing 500 for any extras not found out at the time. Tate, the carpenter, was of opinion that a smaller degree of repair, which might have been done for about 12,000, would have enabled the vessel to carry part of her cargo to England. It appeared that Bassett, in answer to one of the cross-interrogatories, had said that he could not say whether the ship, when repaired, would be worth the expense of repairing her. Mr. Sanders, one of the proprietors of Piston's Establishment, was called as a witness; he said that at the time when the vessel in question was at the Mauritius, a part of the cargo could easily have been sold to raise money for the repairs: he added, that at that time the exchange for bills was 4s. 3d. the dollar, but for bottomry, 25*l.* per cent. was charged, and if an agent were employed to raise the money, 2½*l.* or 5*l.* per cent. more would have to be paid him.

Taddy, Serjt. for the plaintiff:

My brother *Wilde* has taken much too narrow a view of the question of law. In subsequent cases to those which he has cited, the question has been decided to be this, whether or no the ship was worth repairing: *Allen v. Sugrue*,† *Atkinson v. Clarke*.‡ But supposing it to be, whether the sale was necessary, if, as one of the witnesses for the plaintiff said, it would have been madness to have repaired, there was that necessity, and that state of circumstances, which will render it a total loss. Every ship may be repaired, whatever its state; but the question is, whether there is such a state of circumstances, that no prudent

† 32 R. R. 483 (8 B. & C. 561). 26 R. R. 517 (2 B. & C. 691, 1 Car.

‡ *Vide also Cambridge v. Anderdon*, & P. 213).

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man in his senses, *would set about repairing. The mate was in great uncertainty as to the amount of the expense. One said, 16,000 dollars, another 20,000, another only 4,000 or 5,000, and another 40,000 or 50,000. This shews either the infirmity of human judgment, or that these persons were looking at the matter in very different points of view. One might have in view the doing merely enough to enable the vessel just to get through her voyage, and another might contemplate the putting her into a perfect state of repair. But the mate not only was in great uncertainty as to the amount of expense, but he also found that money could not be raised except at a most extravagant rate. He would not have been justified in raising money at that rate, particularly when he found that Piston's Establishment would not bind themselves, in writing, to do the repairs at the sum specified. We are not at liberty to take the other policies into consideration. All you are to look at is the state of the vessel itself. The mate knew nothing about any policy. The valuation at 6,000*l.* in the present policy includes the stores, as well as the ship and sails, and the premium of insurance, which is 480*l.* If you believe the witnesses, it would really have been madness to attempt to repair under the circumstances.

TINDAL, Ch. J. :

The only question in this case is, whether, under the circumstances, there has or has not been a total loss of the vessel, if at all, in consequence of the sale, and that will depend upon whether the sale was a sale that was necessary, for the benefit of the parties concerned. A great deal has been said about the word "necessity." Undoubtedly, it is not to be confined to, or so strictly taken as it is, in its ordinary acceptance. There can, in such a case, be neither a legal necessity nor a physical necessity, and therefore it must mean a moral necessity: and the question will be, whether the circumstances were such, that a person of prudent and sound mind could have no doubt as to the course he ought to pursue. The *points principally for consideration will be, the expenditure necessary to put the ship into a condition to bring home her cargo; the means of performing the repairs, and the comparison between those two things and the subject-matter

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which was at stake ; and it must not be a mere measuring cast, not a matter of doubt in the mind, whether the expense would or would not have exceeded the value ; but it must be so preponderating an excess of expense, that no reasonable man could doubt as to the propriety of selling under the circumstances instead of repairing. A mere fear operating on the mind of the captain, that, if he did not bind the parties down, they would run him up beyond a certain sum, will not be sufficient, unless you are satisfied that it was the necessary consequence of the state of circumstances in which he was placed. A man is not, *quia timet*, so to compromise the interests of other persons, merely on the ground of what passes in his own mind. It seems, that in addition to the amount of the surveys, a large expense would be incurred in heaving down the ship, and it will be for you to consider whether that was absolutely necessary for the purpose of making it sea-worthy. The question turns upon the possibility of making the ship sea-worthy within the limits in which it was, and not on whether the injuries were produced by the weather or not. His Lordship, after stating the substance of the evidence, observed : It comes round, I believe, to the question which I originally proposed. A captain has no power to sell, except from necessity, considered as an impulse, acting morally to excuse his departure from the original duty cast upon him of navigating and bringing back the vessel. If he has no means of getting the repairs done in the place where the injury occurs ; or if, being in a place where they might be done, he has no money in his possession, and is not able to raise any, then he is justified in selling, as the best thing that can be done. In the present case, it appears that the vessel was in a place where the repairs could be done, and *where money could be obtained, although at an extravagant expense. Still the question is, whether the expenditure was so great that no prudent man, in the exercise of a sound and vigorous judgment, would hesitate as to the propriety of selling. If you think, that if the owner himself had been on the spot uninsured, he, in the exercise of a sound discretion, would have repaired the vessel ; or that, if an agent of the underwriters had been there, he, exercising such discretion, would have repaired, then this captain ought certainly

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to have done so. But, if they would not have done so, then I think this captain was not compellable to repair, and the sale in such a case will have taken place under a justifiable necessity.

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v.
SUGGREN.

Verdict for the defendant.

In the ensuing Easter Term, *Taddy*, Serjt., moved for a new trial, partly on the ground of misdirection, and partly on the ground that the verdict was against evidence.

The COURT were of opinion that the case had been properly left to the jury, but granted a rule *nisi* for a new trial, on payment of costs, on the ground that the verdict was against evidence.

SARCH v. BLACKBURN.

(4 Car. & P. 297—301; S. C., Moo. & Mal. 505.)

1830.
Feb. 24.

[297]

A person cannot recover damages for an injury received from the bite of a dog placed in a yard for the protection of out-houses, unless he had such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action of trespass; and if he had such cause, the circumstance of there being a notice on a board in large letters, warning persons to beware of the dog, will not be an answer to an action by him for the injury, if it appear that he was not able to read.

If no suspicion be thrown upon the plaintiff by the defendant, in such a case it may be taken that he had such cause, provided the dog is put in a place forming part of one entrance to the house of the defendant, although there may be other entrances of a more public description, by which the plaintiff might have proceeded.

ACTION for an injury done to the plaintiff's leg by the bite of a dog kept by the defendant.

The plaintiff was a watchman employed in the neighbourhood of Old Ford, where the defendant carried on the business of a milkman, and his sons that of a cowkeeper. The dog was in a yard near a piggery, a chicken-house, and a cow-shed, and was attached to his kennel by a chain about four yards in length; over the kennel, nailed against the palings, was a board, on which was painted in letters three inches in length—"Beware of the dog." The plaintiff was unable to read. There were three entrances to the house and premises in question, one of

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v.
BLACKBURN.

them more public than the other two, which did not lead past the place where the dog was; but it appeared that a person going by either of the more private ways might pass the dog in proceeding to the house.

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A witness named Folger, who was called on the part of the plaintiff, stated that he had been bitten by the dog in question about three years before, and the defendant upon that occasion applied some brandy to his leg. The witness, however, said, on his cross-examination, that the place where the dog was put, was in a private way for the use of the family, and through which he thought he had no business to go; but he had been there before with one of the defendant's sons, and he did not think that the dog would bite him. He added, that robberies were frequently committed in the neighbourhood.

Taddy, Serjt., for the defendant, submitted that there was no case to go to the jury.

TINDAL, Ch. J. :

I think the evidence given by the witness Folger, that the dog had bitten him before, is something to go to the jury. It launches the case. The question I propose to leave to the jury is, whether there was any negligence in the plaintiff in going where the dog was. If it was a way in which he might reasonably go to the house for a lawful purpose, in short, if it might have been pleaded in answer to an action of trespass, then this action is maintainable, otherwise not.

Taddy, Serjt. :

In *Sir W. Clayton's* case† it was very much discussed, whether spring guns might not be set up in grounds without notice; but it was not disputed, that, if notice be given, a man may defend his property by the erection of spring guns.‡

TINDAL, Ch. J. :

It is a very nice question; I will take a note of your objection.

Taddy, Serjt., then addressed the jury for the defendant :

He contended, that, as there was a piggery and a poultry-yard

† 1 Moore, 203.

‡ See now 24 & 25 Vict. c. 100, s. 31.

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BLACKBURN.
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near the place where the dog was, it must *be considered that the dog was necessary to protect the defendant from thieves; and also, that the plaintiff had no right to go to the house through that way, there being other and more public entrances, and this private entrance being for the use of the family only. And with respect to the question as to whether the defendant had been guilty of negligence, he submitted that he clearly had not. If he is to have any dog at all, he must have one sharp enough to be of use. The plaintiff's inability to read is no fault of the defendant; the notice board, with letters three inches in length, was the only way in which he could give notice. Some learned persons have thought that spring guns may be set up without any notice, on the ground that a party has a right to protect himself against persons who have no business on his premises. I submit that the defendant has done all that he could, and has only used the dog for the defence of his premises, and is therefore not liable in this action.

Wilde, Serjt., referred to the case of *Bird v. Holbrook*.†

TINDAL, Ch. J. :

The question will turn upon whether there was a justifiable right to be on the spot.

Taddy, Serjt., referred to the case of *Brock v. Copeland*,‡ and the cases collected in *Roscoe on Evidence*, p. 219.

Wilde, Serjt., called the attention of his Lordship to the form of the second count in the declaration. [300]

TINDAL, Ch. J. :

I think it will all come round to this: You cannot alter the law by the mode of framing the declaration; you must shew that the dog was accustomed to bite, and that the defendant knew it, before you can throw upon him the responsibility of keeping it from doing so. If a man puts a dog in a garden, walled all round, and a wrong-doer goes into that garden, and is

† 29 R. R. 657 (4 Bing. 628, 1 M. & P. 607).
‡ 5 R. R. 730 (1 Esp. 203).

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BLACKBURN.

bitten, he cannot complain in a court of justice of that which was brought upon him by his own act. The difficulty is in saying, whether, in the particular place, the means adopted by the defendant were sufficient. We must see, first, whether the plaintiff had a justifiable and reasonable cause for being on the spot; whether he was there without any notice, having such cause as would justify him if he had an action brought against him as a trespasser, for being on the defendant's premises. It seems that there are three different entrances to the premises; one of them more public than the rest, having a spring gate; another, called the middle entrance, across a field; the third, an entrance across the cow-yard, and through a private gate and another yard to the house. The plaintiff must have gone through one of the last two. Undoubtedly, a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house, that any person coming to ask for money, or on other business, might be bitten. And so with respect to a foot-path, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it. As to the notice, it does not appear to me that a painted notice is sufficient, unless the party is in such a *situation in life as to be able to avail himself of it. It does not appear to me that this notice is sufficient, so as to bar the action, if the plaintiff had any right at all to be on the spot, for it seems that he was not able to read. Then, was there any thing in the appearance of the dog which would lead the plaintiff to suppose, that the dog would bite him. It seems that the injury happened in the middle of the day, in the month of July; and that the plaintiff was a person employed as a watchman in the neighbourhood; and as no suspicion has been thrown upon him by the other side, you may presume that he was going to the house for a lawful purpose. The only way in which I can leave the question (which I admit is one of considerable nicety), for your consideration, is to leave it to you to say on which side was the negligence upon

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this occasion. If there was negligence on the part of the plaintiff, he cannot recover for an injury which he has in part brought upon himself; but if there was no negligence on his part, and there was negligence on the part of the defendant, then the plaintiff will be entitled to your verdict.

SARCH
v.
BLACKBURN.

The jury found for the plaintiff. Damages 70l.

In the ensuing Easter Term, a rule *nisi* for setting aside the verdict was obtained, which was called on for argument in the following Term; when the cause was stated to have been settled, and nothing further took place on the subject.

PAYNE v. JENKINS.

(4 Car. & P. 324—325.)

1830.
Dec. 3.

[324]

A party may recover the amount of an I. O. U. (given in acknowledgment of a debt actually due†), on a count upon an account stated.

ASSUMPSIT for goods sold, with a count upon an account stated. Plea, general issue.

This was an action on an I. O. U. for 6l. 10s.; and it was opened, that the plaintiff, being the owner of an Arabian mare, the defendant gave 25l. in cash, and this I. O. U. as the price of one-half share in this animal.

A witness called for the plaintiff, stated that the defendant admitted the I. O. U. to be his, but said he had paid enough for the mare. In his cross-examination, this witness stated, that there was a written agreement between the plaintiff and defendant for a partnership in this mare; and that this I. O. U. was part of the price paid for the defendant's share; the mare, before that partnership, having been the sole property of the plaintiff.

The I. O. U., which was not stamped, was in the following form:

"I. O. U. 6l. 10s. 0d.

WM. JENKINS."

Campbell, for the defendant:

An I. O. U. is a mere acknowledgment; and, as it appears that this I. O. U. was given for money to be paid under a written

† See *Lemere v. Elliott* (1861) 6 H. & N. 656, 30 L. J. Ex. 350.

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JENKINS.

agreement, that agreement ought to be produced. Another objection is, that there is no special count in the declaration; and I submit that the I. O. U. is not applicable to any of the common counts.

[325] LORD TENTERDEN, Ch. J. :

There is a count upon an account stated.

Campbell:

I submit that an I. O. U. alone will not support an account stated; more especially in this case, where it appears to be coupled with a written agreement.

LORD TENTERDEN, Ch. J. :

An I. O. U. has been admitted on the account stated a great many times. The written agreement has nothing to do with it. He gives this as the price of becoming a partner; he pays it for having the written agreement.

Verdict for the plaintiff. Damages 6l. 10s.

1830.
July 3.

PROCTOR v. HARRIS.†

(4 Car. & P. 337—338.)

[337]

A publican, who has a flap-door in the foot pavement of the street, opening into a cellar underneath his house, is bound, when he uses it, to conduct his business with such a degree of care as will prevent a reasonable person, acting himself with an ordinary degree of care, from receiving any injury by it.

ACTION for an injury sustained by the plaintiff in consequence of his having fallen into a space occasioned by the opening of a trap door in the foot pavement, in front of the house of the defendant, who was a publican, and, at the time of the injury, being lamp-light in the evening, had just had a butt of beer let down by the aperture in question into his cellar.

TINDAL, Ch. J., in summing up, said :

The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of

† See *Daniels v. Potter*, and note, p. 793, ante.—R. C.

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HARRIS.

security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood, that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, *used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at this hour, being after dark. If you think so, you will find for the plaintiff. But, if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant.

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Verdict for the plaintiff. Damages 5l.

STEPHENS v. MYERS.

(4 Car. & P. 349—350.)

1830.
July 17.

[349]

A. was advancing in a threatening attitude, with an intention to strike B., so that his blow would have almost immediately reached B., if he had not been stopped: Held, that it was an assault in point of law, though, at the particular moment when A. was stopped, he was not near enough for his blow to take effect.

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea, not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons

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MYERS.

between him and the plaintiff. The defendant having, in the course of some angry discussion, which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this, the defendant said, he would rather pull the chairman out of the chair, than be turned out of the room; and immediately advanced with his fist clenched toward the chairman, but was stopt by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman; but the witnesses said, that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence contended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat—there was not a present ability—he had not the means of executing his intention at the time he was stopt.

TINDAL, Ch. J., in his summing up, said :

[*350] It is not every threat, when there is no actual personal violence, that constitutes *an assault, there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman, if he had not been stopt; then, though he was not near enough at the time to have struck him, yet if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing, that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages, as you think the nature of the case requires.

Verdict for the plaintiff. Damages 1s.

WHITTUCK. v. WATERS.†

(4 Car. & P. 375—376.)

1830.
Aug. 24.

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In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives; a register of burials of a Wesleyan chapel, is not admissible to prove the death of one of the *cestuis que vie*; nor is the evidence of a witness who heard in the family that another of the *cestuis que vie* was dead. *Semble*, that a copy of an inscription on a tomb-stone in the burial ground of a Wesleyan chapel is also not evidence for this purpose.

ACTION, for the use and occupation of certain property which had been demised to the defendant for a term of years, determinable on three lives. It was opened on the part of the lessor of the plaintiff, that all the three *cestuis que vie* had died before the time from which the plaintiff claimed for the use and occupation.

To prove the death of one of them, a witness produced an examined extract from the register of burials at the Wesleyan Chapel at Kingswood.

PARK, J.:

I cannot receive the registers of the Wesleyan chapel as evidence of the death.‡

The same witness, to prove the same death, produced a copy of an inscription from a tomb-stone in the burial-ground adjacent to the same chapel.

PARK, J.:

I entertain very great doubts whether this inscription is receivable in evidence. However, I will not reject it, and will let the case proceed.

The evidence as to the death of another of the *cestuis que vie*,

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† Cited in judgment of *Haines v. Guthrie* (1884) 13 Q. B. D. 818.—R. C.

‡ The Fleet registers have been repeatedly held not to be admissible in evidence to prove a marriage. In the case of *Leader v. Barry*, 1 Esp. 353, Lord KENYON would not receive

an examined copy of the register of marriages at the Swedish ambassador's chapel at Paris, as proof of a marriage. And in the case of *Huet v. Le Mesurier*, 1 Cox, 275, it was held, that a copy of a register of baptisms, kept in the Island of Guernsey, was not admissible.

WHITTUCK was merely that the witness had heard in the family that the
 r.
 WATERS. person was dead.

PARK, J. :

That will not do. This is not a question of pedigree, where hearsay in the family is admissible.

This evidence was therefore rejected.

Another witness proved that he had said to the defendant, "Why did you not get your lease renewed before all the lives had dropped;" and that the defendant had replied, "The lives had dropped, and I did not know of it."

PARK, J. :

I will leave the case to the jury on this admission; but I shall also tell the jury, that the defendant was speaking of a fact which did not appear to be within his own knowledge; and that, therefore, it is highly probable, that he said the lives had dropped, only because some one had told him so.

Russell, Serjt., elected to be nonsuited.

Nonsuit.[†]

1831.
 Feb. 23.

HOWARD v. CHAPMAN.

(4 Car. & P. 508—513.)

[508]

A traveller who receives orders for goods from his employer's customer in the country, is authorized to receive payment for them in money, but not in other goods.

ASSUMPSIT for goods sold and delivered. The plaintiff sought to recover from the defendant a sum of 19*l.*, being the price of a quantity of hemp. The plaintiff lived in London, the defendant at Horncastle, and it appeared, from the cross-examination

† By the stat. 19 Car. II. c. 6, persons on whose lives estates are held, are to be considered as dead, if they be absent seven years, and there is no proof that they are alive. And, by the statute 6 Ann. c. 18, the reversioner, or person interested, may, once

a-year, by an application to the Court of Chancery, supported by affidavit, compel the production of the person on whose life the estate is held; and if the person be not produced, the reversioner may enter on the lands.

of one of the plaintiff's witnesses, that a person named Sudbury, who was the plaintiff's traveller, took all the orders from the defendant in the course of his various journies, and that the defendant did not give any orders by letter.

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On the part of the defendant, it was then proved, that Sudbury called for payment of the 19*l.*, the subject of the plaintiff's demand, when some difficulty arose as to the payment of it in money; and the defendant said he had *some horse-hair which he would let the plaintiff have; that Sudbury went and looked at it, and valued it at 20*l.* 5*s.*; that he put down the cost of the carriage to London, and wrote under the account "Settled, J. SUDBURY," and put the plaintiff's address on four cards, which were affixed to four parcels, in which the hair was sent up by boat to London.

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Taddy, Serjt., for the defendant, relied on this as payment, and contended that a traveller who was authorized to take orders, was also authorized to receive payment.

TINDAL, Ch. J.:

Yes, payment in money, but not in goods. I doubt if Sudbury would have been authorized to buy hemp, and I think that he certainly was not authorized to buy horse-hair. You can call him to shew whether he had authority or not.

Taddy, Serjt., after attempting, by several other witnesses, to make out the authority, called Sudbury, who stated, that he took the order for the hemp in question, and, as usual, on the following journey, six months after, called for payment, when the defendant said he could not pay; that he called again, six months after that, and the defendant promised to send some horse-hair to Messrs. Gardner, in London, which would cover the amount. The plaintiff was to get the money from them. That six months after, viz. in September, 1830, he went again to the defendant, and asked if he had sent up the hair; he replied, no, and that he could not pay the money, but that he had some hair by him which the witness might have. The defendant shewed him Gardner's prices in a letter, and offered

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the hair at those prices ; and the witness agreed to take it. The witness said, that he told the plaintiff of the previous offer to send up hair to Gardner's, to which he made no objection ; but, on inquiry at Gardner's, it was found that none had been sent ; he added, that he believed the hair *was received by the plaintiff, and he thought that the plaintiff had told him that he had shewn it to some one to ascertain its value. On his cross-examination, he said that he had no authority to enter into any dealings in horse-hair.

TINDAL, Ch. J. :

A subsequent ratification is just as good as an authority. I shall leave the question of authority to the jury.

Spankie, Serjt. :

Does your Lordship think that there is any evidence of ratification ?

TINDAL, Ch. J. :

Yes, I think this is evidence. A witness says that the horse-hair was directed to the plaintiff, and sent by boat ; and, in the ordinary course of business, it would come to him, and he should have sent it back. Besides, the witness Sudbury says, that he thinks the plaintiff told him that he had shewn it to some one.

To rebut this case on the part of the defendant, the plaintiff's clerk was called, and proved that the plaintiff did not deal in horse-hair ; that the hair in question arrived on the 14th of October, and was put into the warehouse, but was not unpacked ; that one or two persons came to examine it, and it was afterwards sent back.

It appeared that the hair was of three different sorts, of which Gardner's prices were, per pound, 10*d.*, 1*s.* 6*d.*, and 3*s.* 3*d.* ; and a horse-hair manufacturer, named Buckingham, said, that the prices of fair samples at the time of the same description were 8*d.*, 1*s.* 3*d.*, and 2*s.* 9*d.*, and that he saw the inferior sample, which was called short, and offered the plaintiff 8*d.* a pound for it if he would keep it for him till the 1st of January ; but the plaintiff declined, saying, he wanted a better price.

On the 28th of October, application having been made for payment of the 19*l.* in money, the defendant wrote to *the plaintiff a letter, commencing with these words: "SIR, do you want paying twice over for your short weight hemp," and stating that the account had been settled with the traveller.

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To this, an answer was returned on the 30th of October, stating, that the horse-hair had been valued by one of the first brokers; that the utmost value was 8*d.*; and that it was then selling at 6*d.*; and adding, that Sudbury had no authority; and, if he had, the defendant's attempt at overreaching would justify the plaintiff in repudiating the contract.

This letter was addressed to the defendant, and returned to the plaintiff with the post-office mark "refused."

Taddy, Serjt. submitted that this letter could not be evidence against the defendant, as it had not reached him.

TINDAL, Ch. J.:

You cannot get rid of the effect of a notice by refusing to take it in.

The hair was not sent back till a day or two after the action was commenced, and, when it arrived at Horncastle, the defendant refused to take it in, and it remained at the wharf.

Taddy, Serjt., for the defendant:

The plaintiff has ratified the conduct of Sudbury, and meant to take advantage if he could of any higher price that the article might fetch. Why did he not return it sooner? He is concluded, as he did not send it back till after the action was brought.

Spankie, Serjt., in reply:

The plaintiff only kept the horse-hair long enough to see whether it was worth accepting, and this does not bind him to an acceptance of it. Sudbury, the traveller, had no knowledge of the value of horse-hair. There was no offer of sale on the plaintiff's *part to Buckingham; he was only taking the benefit

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of his judgment. The plaintiff only kept it a week or ten days, for, on the 28th of October, the defendant writes acknowledging that he had received an intimation from the plaintiff on the subject, and the horse-hair only arrived on the 14th. The bargain was negligently made, without authority, by a person ignorant of the nature of the article, and that gives the plaintiff a reasonable time to see if the horse-hair could be turned to account. According to the first arrangement, the hair was to be sent to Gardners for sale, and not to the plaintiff. It is also an attempt at imposition on the part of the defendant, as the horse-hair sent was not of the value of Gardners' prices.

TINDAL, Ch. J. :

The only question in this case is, whether the contract made by Sudbury, to take horse-hair as payment instead of money, has ever been ratified by Howard, the plaintiff; because, undoubtedly the situation of Sudbury, who was merely a traveller, authorized to take orders, could not, in itself, give him the power to make such a contract. Therefore, we must look at the conduct of the plaintiff afterwards. The first arrangement was very different in its circumstances from the last; because, according to that, the hair was not to be sent for the plaintiff to sell, but to Gardners, who were to pay the plaintiff the proceeds in money. Undoubtedly Sudbury did take upon him to receive the horse-hair in satisfaction of the debt, at the current prices mentioned in Gardners' letter. In point of law, as far as we have any evidence, there was not any prior authority. Sudbury himself says he never did anything of the kind before. It is for you to say whether the plaintiff was dealing with the horse-hair as his own, or whether he was only trying to ascertain its value. For he had a right, when an article came, which was fastened in bags, and in which he was not a dealer, before he adopted the act of his agent, to see what the real value of the commodity was, provided he did not keep it an unreasonable *time. It is for you to say, whether the acts of the plaintiff were those of a man dealing with the article as if it was his own or not. That is the only question in the cause.

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Verdict for the defendant.

WELLS *v.* HEAD.

(4 Car. & P. 568.)

1831.

Mar. 1.Aylesbury.

[568]

The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off: Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property.

ACTION for shooting the plaintiff's dog. It was proved that the dog had worried some sheep belonging to the defendant; but it appeared that he had left the field in which the sheep were, had crossed an adjoining close, and was in a third when the defendant shot him.

ALDERSON, J., said, that whatever the provocation to shoot the dog might be, yet the verdict must pass for the plaintiff, for it was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were. But, though there could not be a verdict for the defendant, the habits of the dog might be considered in mitigation of damages.

Verdict for the plaintiff. Damages, One Guinea.

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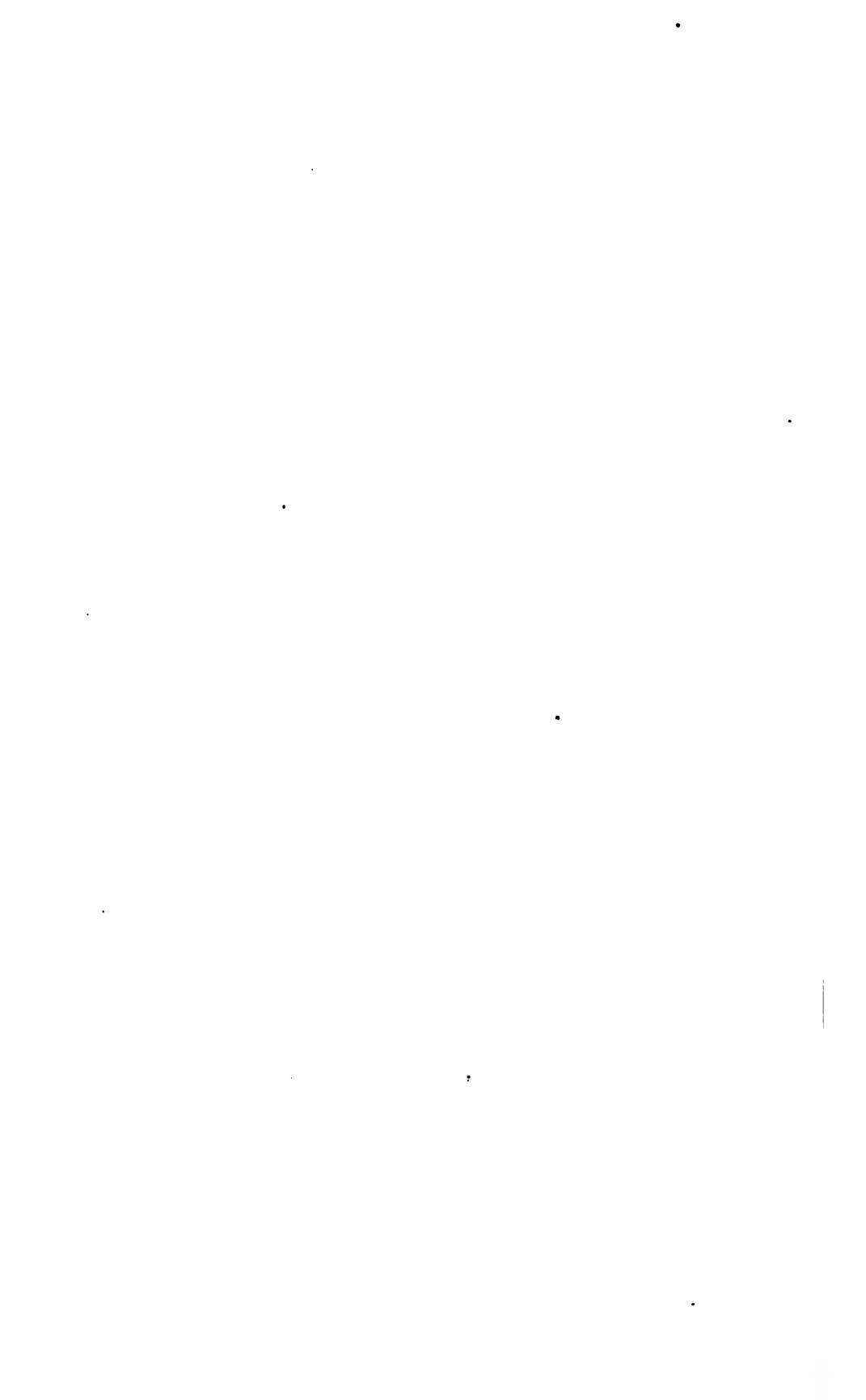
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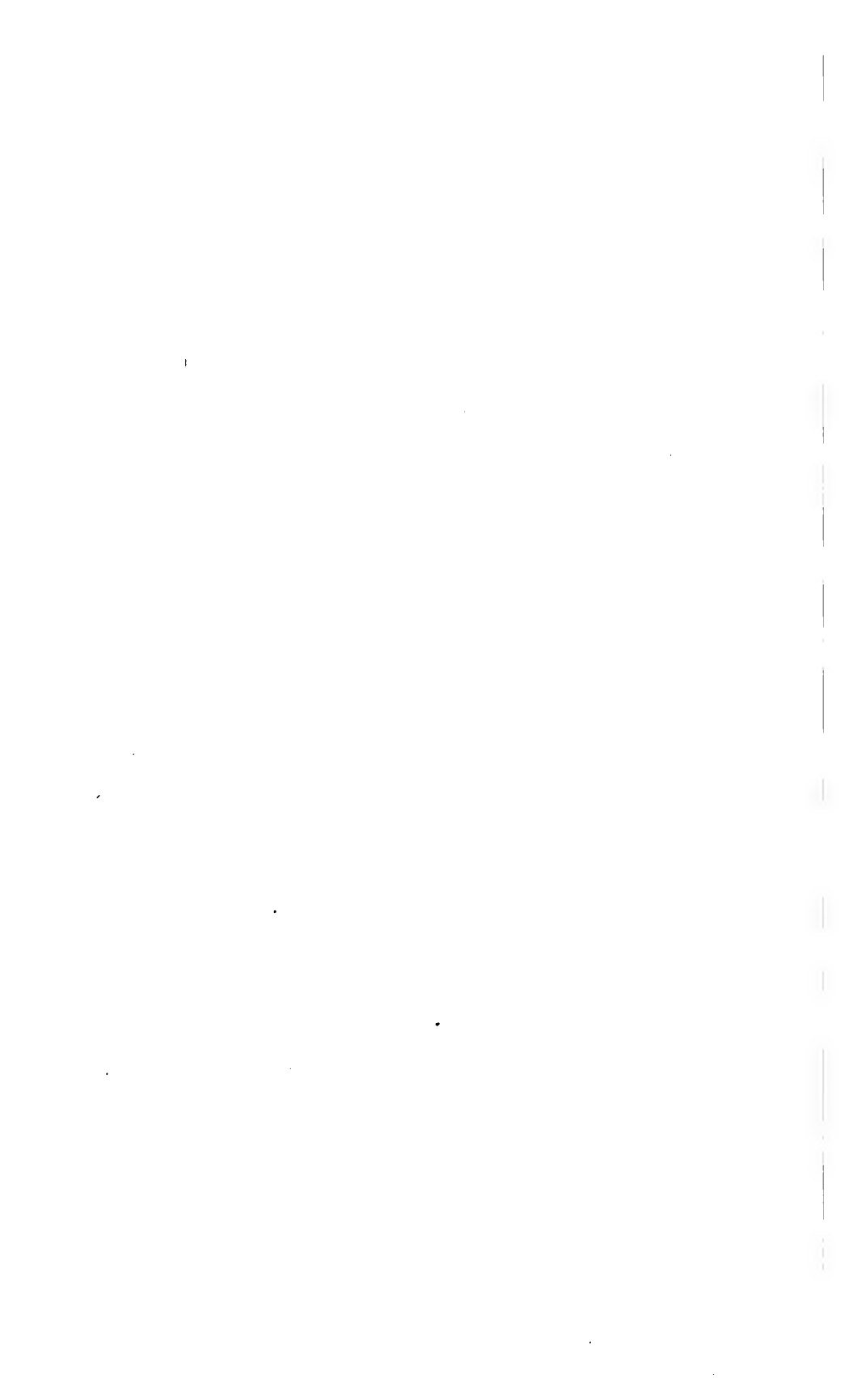
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